TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]145

MORRIS LEVINSON, APPELLANT,

vs.

THE UNITED STATES OF AMERICA AND S. HARRY JOHNSON.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED SEPTEMBER 28, 1920.

(27,924)

(27,924)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 567.

MORRIS LEVINSON, APPELLANT,

vs.

THE UNITED STATES OF AMERICA AND S. HARRY JOHNSON.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 29, 1920.

1 *Equity Subpœna.*

The President of the United States of America to Morris Levinson and S. Harry Johnson:

You are Hereby Commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by United States of America and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you and each of you of Two Hundred and Fifty Dollars ($250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 12th day of January in the year one thousand nine hundred and twenty and of the Independence of the United States of America the one hundred and forty-fourth.

ALEX. GILCHRIST, JR.,
Clerk.

FRANCIS G. CAFFEY,
Plaintiff's Solr.

The defendants are required to file their answer or other defense in the above cause in the Clerk's office of this Court, on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk.

2 *Bill of Complaint.*

District Court of the United States, Southern District of New York.

UNITED STATES OF AMERICA, Complainant,

vs.

MORRIS LEVINSON and S. HARRY JOHNSON, Defendants.

Bill of Complaint.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Your orator, the United States of America, upon information and belief, complaining shows unto your Honors:

I. That the complainant, the United States of America, is a corporation sovereign.

II. That the defendant, Morris Levinson, and the defendant, S. Harry Johnson, are citizens of the United States and residents of the Southern District of New York.

III. That heretofore, to wit, on or about the 11th day of July, 1919, the Honorable Josephus Daniels, Secretary of the Navy, under and by virtue of the Acts of Congress of the United States, approved March 3, 1883, and August 5, 1882, as modified by Executive Order 3021, 7th of January, 1919, offered for sale by a written offer of sale, dated July 11, 1919, certain yachts and motor boats, which were then and there the property of the United States of America; that the said offer provided that bids for the said vessels would be received by the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., until 12 o'clock noon, 29th of August, 1919, at which time and place they would be publicly opened, and that the vessels would be sold for cash to highest bidders;

IV. That among the vessels so offered for sale, there was one named "Wadena," which in the said offer of sale was described as follows:

"The Wadena S. P. 158, is a steam yacht, built in 1891, length 176 feet, beam 21 feet, draft 7 feet, speed 13 knots, 600 H. P., 250 T. gross, has a 3-exp. 3-cyl. engine. She is now at the Marine Basin, Ulmer Park, New York. Exact location and permission to examine may be obtained from the Commandant, Third Naval District, Fleet Supply Base, 29th St. and 3rd Avenue, Brooklyn, N. Y. Appraised value $12,000.00."

V. That the said offer of sale contained the following provisions:

"Each bid must be accompanied by either cash deposit, satisfactory certified check, liberty bonds, or a guaranty bond, (personal or surety), in a sum equal to not less than one tenth of the amount of the bid. If liberty bonds are deposited they will be regarded as surety only and will not be acceptable at face value in part payment of the vessel. If a guaranty bond is given, the same will provide for the payment of the entire amount of the bid within 30 days from date of its acceptance. In case full payment of an accepted bid is not made within 30 days of its acceptance, the cash, certified check, liberty bonds or amount covered by guaranty bond shall be considered as forfeited to the Government and shall be applied as directed in the Act of March 3, 1883. Checks should be made payable to the Paymaster General of the Navy.

"If tie bids are received, award will be decided by lot. All deposits by bidders, whose bids are not accepted, will be returned to them within seven days after the date of opening.

"The vessels must be removed by the purchasers at their own expense within such reasonable time as may be fixed by the Department.

"The Department reserves the right to withdraw the vessels from

sale at any time prior to acceptance of proposals and to reject any or all bids.

"The vessels will be delivered to the purchasers in the condition in which they are exhibited, and will be accompanied only by the articles then on board.

"Bidders are cautioned to have an understanding with the Commandant concerned as to the equipment which will be delivered with the boat. If the bidders desire to purchase the radio sets which may be on board, separate notation of the amount they desire to pay for same should be noted on their bids for the vessels. The Navy will reserve the right to accept the offer for the radio set or to remove the same before delivery.

"The Department will not be responsible for errors or inaccuracies in the foregoing descriptions, as the vessels can be examined by parties interested."

5 VI. That thereafter on or about the 22nd day of August, 1919, the Honorable Josephus Daniels, Secretary of the Navy, under and by virtue of the Acts of Congress of the United States approved March 3, 1883, and August 5, 1882, as modified by Executive Order 3021, 7th of January, 1919, offered for sale by a written offer of sale, dated August 22, 1919, certain other yachts and motor boats, which were then and there the property of the United States of America, the said offer of sale providing that the bids for the said vessels would be received by the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., until 12 o'clock noon, September 8, 1919, at which time they would be publicly opened, and the vessels would be sold for cash to the highest bidders; that among the vessels so offered for sale, there was one named "Wandena", which in the said offer of sale was described as follows:

"The Wandena S. P. 354, is a Motor Boat, built in 1913, length 58 feet 5 inches, beam 13 feet, draft 3 feet 6 inches, speed 11 knots, 38 T gross, 75 I. H. P. has a 20th century engine. She is now in Third Naval District. Exact location and permission to examine may be obtained from the Commandant, Third Naval District, Fleet Supply Base, 29th St. & 3rd Ave., Brooklyn, N. Y. Appraised value $5,500."

VII. That heretofore and prior to August 20, 1919, the defendant, Morris Levinson, duly submitted in writing to the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., a bid in the sum of $5,150 for said "Wadena", and said bid was accompanied by a certified check for $515 being 10% thereof as required
6 by said offer of sale. This bid was duly placed with other bids received for the same vessel. After July 11 and prior to August 20, 1919, the defendant, S. Harry Johnson, duly submitted in writing through the mails to the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., a bid in the sum of $6,500 for said "Wadena" and said bid was accompanied by a certified check for $650 being 10% thereof as required by said offer of sale. Through inadvertance and mistake and by reason of the similarity

of the names "Wadena" and "Wandena", said bid of the defendant, S. Harry Johnson, was placed with the bids for the vessel "Wandena" and not with those of the vessel "Wadena".

VIII. That thereafter on the 20th day of August, 1919, the bids for the said vessel "Wadena" were opened, and that at the said time the highest bid found was the one by the defendant, Morris Levinson, for $5,150. Accordingly the said "Wadena" was awarded to the defendant, Morris Levinson, as the highest bidder; that a check for the balance of said bid of $5,150, namely $4,635, was delivered to the Navy Department, Washington, D. C., by the said defendant, Morris Levinson; that thereafter on September 3, 1919, a bill of sale for the said "Wadena" was sent to the said defendant, Morris Levinson, a copy of said bill of sale, marked Exhibit "A", being hereto annexed and made a part hereof.

IX. That thereafter on September 8, 1919, bids were opened for the vessel "Wandena", and among the bids for the said vessel "Wandena", was found the said bid for the said "Wadena" from
7 the defendant, S. Harry Johnson, for the sum of $6,500.

X. That said bid for $6,500 from the said defendant, S. Harry Johnson, was higher than the said bid of $5,150 from said defendant, Morris Levinson, and was the highest bid received for the said vessel "Wadena".

XI. That immediately upon discovery of the said bid of the said defendant, S. Harry Johnson, for $6,500 for the said "Wadena", the Navy Department stopped delivery of the "Wadena" to the said defendant, Morris Levinson, said checks for $515 and $4,635, which the defendant, Morris Levinson, had previously sent to the Navy Department, were returned to him with the request that he surrender the said bill of sale theretofore sent to him; that the said defendant, Morris Levinson, however, returned to the Navy Department said two checks, and demanded delivery of the "Wadena" to him, and claimed that title to the "Wadena" had passed to him by reason of the facts hereinbefore set forth.

XII. That the defendant, S. Harry Johnson, is ready and willing and has offered to pay for the said "Wadena" the full price of his said bid, $6,500 and demands delivery of the "Wadena" to him as his property, by reason of the facts hereinbefore set forth.

XIII. That your orator has been unable to determine who is the rightful owner of the said "Wadena" and to whom the delivery of said vessel should be made.

8 XIV. And your orator further shows that is has always been and now is willing to deliver said "Wadena" to such person or persons who may be lawfully entitled thereto, upon such terms as are just and proper.

XV. And your orator further shows that is has not in any respect colluded with the said defendant, Morris Levinson, or the said de-

fendant, S. Harry Johnson, touching on the matters in this cause, and it has not been indemnified by said defendant, Morris Levinson, or said defendant, S. Harry Johnson, but brings this suit of its own free will to avoid being molested and injured, touching on the matters in this bill.

Wherefore, as your orator can have adequate relief only in this Court:

1. To the end that the defendants may answer this bill and interplead and settle their rights in the ownership of said vessel "Wadena"; that it may be adjudged and decreed by this Court which of the said defendants is entitled to the said vessel "Wadena" and upon what terms; and that upon said determination and the delivery of said vessel "Wadena" by your orator to whichever of said defendants your Honors may decree to be entitled to the said vessel "Wadena", upon the due performance of such terms and conditions as your Honors may adjudge and decree, your orator may be decreed to be discharged from all liability to the said defendants in the premises, and that your orator prays accordingly, and may it please your Honors to grant unto your orator writs of subpœna to be directed to the defendant, Morris Levinson, and to the defendant, S. Harry Johnson, commanding them on a day certain to be
9 and appear before this Honorable Court, and then and there to answer all and singular the premises aforesaid and to stand to perform and abide by such order, direction and decree therein as to your Honors shall seem meet.

And your orator will ever pray, etc.,

UNITED STATES OF AMERICA,
Complainant.

By FRANCIS G. CAFFEY,
United States Attorney for
Southern District of New York,
Solicitor for Complainant.

Exhibit "A."

UNITED STATES OF AMERICA:

[SEAL.]

Navy Department.

Washington, D. C., 3 September, 1919.

This certifies that, under authority given to the Secretary of the Navy by the fifth section of the act of Congress approved March 3, 1883, (Chap. 141, Statutes at Large, Vol. 22, page 600), and after a full compliance with all the conditions thereof, Morris Levinson having become the legal purchaser of the U. S. S. Wadena, sold under the advertisement of the Navy Department of 20 August, 1919, and having paid the United States the sum of Five Thousand

One Hundred fifty dollars ($5,150.00) therefor, the receipt
10 of which is acknowledged, said vessel is hereby delivered to and declared to be the property of said Morris Levinson.

In testimony whereof I have hereunto set my hand and caused the seal of the Navy Department to be affixed at the City of Washington this 3 day of September in the year of our Lord one thousand nine hundred and nineteen.

FRANKLIN D. ROOSEVELT.
Acting Secretary.

UNITED STATES OF AMERICA,
State of New York,
Southern District of New York, ss:

Peter B. Olney, Jr., being duly sworn, deposes and says that he is an Assistant United States Attorney for the Southern District of New York and is in charge of this action. Deponent has read the foregoing bill of complaint and knows the contents thereof and the same is true to his own knowledge except as those matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

The sources of deponent's information and the ground of his belief as to the matters therein stated upon information and belief are originals and copies of letters and reports from and to various officials of the United States of America.

PETER B. OLNEY, JR.

Sworn to before me this 8th day of January, 1920.
[SEAL.] CARL BRECKER.
Notary Public, Kings County.

Clerk's No. 466.
Register's No. 1,213.
N. Y. Clerk's No. 569
Reg's No. 1,560.
Commission expires March 30, 1921.

11 *Answer of Defendant Morris Levinson.*

District Court of the United States, Southern District of New York

UNITED STATES OF AMERICA, Complainant,

against

MORRIS LEVINSON and S. HARRY JOHNSON, Defendants

Answer of Morris Levinson.

The defendant Morris Levinson above named, by Messrs. Duncan & Mount, his solicitors, answering the bill of complaint of the above named plaintiff, shows to the court as follows:

1. The defendant Morris Levinson admits each and every allegation in said bill of complaint contained.

He avers however, that the date "20 August 1919" set out in the
sth line of Exhibit "A" of said Bill of Complaint should be "11
July, 1919," as shown by the original bill of sale given to the defend-
ant Morris Levinson, which will be produced upon the hearing.
Wherefore, the defendant Morris Levinson prays that this Honor-
able Court will be pleased to enter a decree herein adjudging that the
title to the said vessel "Wadena" is in the defendant Morris Levinson
and that the said defendant Morris Levinson is entitled to the
12 immediate possession of the said vessel "Wadena" and for
such other and further relief in the premises as may be just.

DUNCAN & MOUNT,
Solicitors for the Defendant Morris Levinson.

Office & P. O. Address, 27 William Street, Borough of Manhattan,
N. Y. City.

JOHN A. McMANUS,
Of Counsel.

Answer of Defendant S. Harry Johnson.

District Court of the United States, Southern District of New York.

UNITED STATES OF AMERICA, Complainant,

against

MORRIS LEVINSON and S. HARRY JOHNSON, Defendants.

Answer of Defendant S. Harry Johnson.

To the Honorable the Judges of the United States District Court
for the Southern District of New York:

The defendant, S. Harry Johnson, by Henry Amerman, his solici-
tor, answering the Bill of Complaint herein:
3 First, Defendant, S. Harry Johnson admits each and
every allegation set forth in the Bill of Complaint.
Wherefore the defendant, S. Harry Johnson, prays that your
Honors adjudge and decree that his bid of Sixty-five hundred dollars
($6,500), being the highest bid, be accepted and that he be awarded
possession of the vessel "Wadena" upon the payment by him of the
balance of his bid as set forth in said Bill of Complaint, and that he
have such other and further relief as to your Honors may seem just
and proper in the premises.
And the defendant, S. Harry Johnson, will ever pray.

HENRY AMERMAN,
Solicitor for Defendant S. Harry Johnson.

Office & P. O. Address, 233 Broadway, Borough of Manhattan,
City of New York.

14 STATE OF NEW YORK,
City of New York,
County of New York, ss:

S. Harry Johnson, being duly sworn, deposes and says: That he is the defendant above named; that he has read the foregoing Answer and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein alleged on information and belief, and that as to those matters he believes it to be true.

S. HARRY JOHNSON

Sworn to before me this 22nd day of January, 1920.

MAE GROSS,
Notary Public, Bronx Co., No. 53.

New York Co. Clk's No. 103.
Reg. No. 1,116.
Kings Co. Clk's No. 62.
Reg. No. 1,113.
Commission expires March 30, 1921.

15 *Opinion.*

District Court of the United States Southern District of New York.

In Equity.

17-36.

UNITED STATES OF AMERICA, Complainant,

against

MORRIS LEVINSON and S. HARRY JOHNSON, Defendants.

Before Honorable Learned Hand, District Judge.

January (1920) Term.

New York, January 31, 1920.

Appearances:

Francis G. Caffey, Solicitor for Complainant, by Peter B. Olney, Jr., Assistant District Attorney, Counsel.

Duncan & Mount, Solicitors for Defendant Levinson by John A. McManus, Counsel.

Henry Amerman, Solicitor and Counsel for Defendant Johnson.

16 E 17-36.

UNITED STATES

vs.

LEVINSON AND JOHNSON.

Learned Hand, D. J.

January (1920) Term

Final Hearing—Opinion

The COURT (orally): This is a Bill of Interpleader brought by the United States against the two defendants, who are rival claimants for the steam yacht "Wadena," which had been commandeered by the United States during the recent war and was to be sold by the Secretary of the Navy, as one of the vessels now unnecessary for the purposes of his Department.

The Statute authorized the sale of such ships to the highest bidder unless otherwise provided by executive order, and on January 7, 1919, the President, acting in accordance with the permission so granted by the Statute, made an executive order, in which he directed the Secretary of the Navy, to sell all such vessels of which the "Wadena" was one, after an appraisal by a Board of Officers of the Navy to the former owners, if the former owners should accept the appraised value, but if they were unwilling to do so, then the President went on to say, "The Secretary of the Navy shall advertise and sell at public sale any and all of said vessels, which are, in his opinion not necessary for the needs of the Navy for such price as he shall approve." Acting in accordance with that executive order,
17 the Secretary of the Navy, on July 11th of last year, advertised the "Wadena" among other boats for sale. The sale was to take place on the 20th of August, and it was announced that the vessel would be sold for cash to the highest bidder. It was also announced by the Secretary that the Department, which means the Secretary, reserved the right to withdraw the vessels from sale at any time prior to the acceptance of the proposal, and that he also reserved the right to reject all bids. The two defendants each put in bids for the "Wadena" accompanied by a check of ten per cent of the amount of their bids, as the advertisement required.

Each of these bids arrived at the proper office of the Department before the 20th day of August, 1919, the day on which they were to be opened. But it so happened, through some mistake or inadvertence, presumably that of a clerk in the Department, that the defendant Johnson's bid was misplaced or put in a pigeon hole or box of another vessel called the "Wandena," which was to be sold on September 8th. Through this mistake, presumably of a clerk, when the proper officer of the Secretary of the Navy opened the bids

for the "Wadena," the highest bid was found to be that of the defendant Levinson, for $5,150, and this bid was in proper form and contained the necessary check for ten per cent. It was accepted and a bill of sale was given to Levison but the ship was not delivered. On September 8th, when the "Wandena" came to be sold, it was at once discovered upon opening the bids, that one of the bids in the box of the "Wandena" had properly belonged in that of the "Wadena," and the Navy Department then sent word to Levinson who had, as I have said already, procured his Bill of Sale, and returned to him his two checks, requesting that he return the Bill of Sale to cancel the transaction. This, Levinson was unwill-
18 ing to do, and as both he and Johnson were claiming the vessel, the United States brought this Bill, attempting to have adjusted in this case, the claims between them. A number of questions arise.

The first one is as to the jurisdiction of this Court to entertain the Bill at all. This point has not been raised by either defendant but if it goes to the subject matter of the Bill, it is necessary that I should take it myself. As to the equitable subject matter of the Bill, I think the jurisdiction exists. Here is a case in which the United States holds a piece of personal property, as to which it makes no claim, but it is subject to the demands of two persons who do claim it, for Levinson demands it under his Bill of Sale, and Johnson demands it because he says that he was the highest bidder and that the Statute gave the absolute right to the highest bidder. I am not certain that either of these claimants could sue the Government for failure to accede to its demand, although, if the question was one of contract, the sum being less than ten thousand dollars it is possible that under the Tucker Act, such a claim would lie. But regardless of that question, it seems to me that this is a case if not strictly of interpleader, in the nature of an interpleader, sufficiently to give jurisdiction to a Court of Equity to adjust the demands between the parties really interested in it, and the Government has the right to come in the guise of plaintiff in Equity and have the matter disposed of. So that point, which neither party has raised as an objection, I pass, and decide that the assumption of this jurisdiction is within the usual rules of Equity practice, or at least sufficiently near to justify my going on with the merits.

19 The first question on the merits is whether the Statute gave to the highest bidder an absolute right to the vessels sold. Both sides agree that if that is the fact, Johnson must have the best, for if the Secretary never had any authority to sell to any but the highest bidder, Johnson certainly was the highest bidder, and any act of the Secretary in giving a Bill of Sale to Levinson was in violation of the Statute, and that could give no rights to Levinson, nor take any rights from Johnson. And moreover, if that be the meaning of the Statute and Order, Johnson has a standing to assert that right, since he has fallen within the terms of the Statute and has an absolute statutory right.

The first question is whether the Statute and the Order impose any such absolute duty upon the Secretary of the Navy. I think they

do not. The Statute itself clearly contemplates that the President shall have the power to vary the method of sale. It says that the sale shall be to the highest bidder, but it states that this may be varied by executive order, and both sides agree so far. If so, the question comes down to an interpretation of the executive order of January 7, 1919, and in particular, to the meaning of the words which I quoted a while ago, that "the Secretary of the Navy shall sell at public sale for such price as he shall approve." I agree that "public sale" means that the sale must be at public auction, or at an auction of some sort or other. I think, if the Secretary attempted to sell at a time and place when the bids were not public, it would be not a legal sale. But it seems to me that it quite clearly does not require him to sell to the highest bidder, and my reason for that is this: If it did so require him to sell, why was it necessary
20 to make an executive order at all, since the Statute required such a sale in the absence of an executive order; and furthermore, passing that question, if the sale was to be to the highest bidder, why should the executive order have added the words, "for such price as the Secretary should approve." A sale to the highest bidder was the natural form of words which the order would have used. By giving him a right to approve a price, I think it clearly gave him some discretion as to what price he was to approve. The provision for a public sale was undoubtedly intended as a check upon his powers, and what I think the order means is this, that he must act openly and publicly, so that there should be some check upon what he does, but that provided he does act publicly he may select between bids that which he approves. Of course, since the sale must be public and since the bids must be known, no officer would be likely to accept a very markedly lower bid than the highest. He would be at once subject to criticism. For that reason, as I say, I think that the condition of a public sale was a very effective check upon the discretion or latitude which the order gave him. But I think it nevertheless did give some discretion to him, and so, it seems to me, that the defendant Johnson has no standing here as the highest bidder, nor do I think that the sale to the defendant Levinson was illegal, as violating any valid executive order or any Statute.

That being true, there remains the other question which has been argued at some length, and that is, whether there was a mutual mistake, and whether the mistake has been rescinded by the action of the Navy Department, when, on September 8th, it rede-
21 manded the Bill of Sale from Levinson. As the action of the department was not in violation of any valid order, the situation is to be regarded I think quite in the same way as though this took place between individuals. Now Johnson's bid had been sent to the Navy Department. It is true it was not opened. It is true, therefore, that the Clerk did not actually know its contents, but, it seems to me quite an abuse of words to say that the Navy Department acted under any mistake. Like any other corporation it was absolutely charged with notice of that which came to it in the regular course of the mails, whether it opened it or it did not; nor can it,

any more than any other corporation, assert that because one of its subordinates failed to open the letter which came and which contained all the necessary information, it was, therefore, acting under a mistake. If we forget that we are dealing with the Government, and suppose that we are dealing with individual parties, I think this appears so obvious that no one could hesitate to accept it. If an individual, for example, advertised the sale of his property to the highest bidder, and he failed in any way to open the mail which came to him, although it did actually come to him, properly delivered, or it his clerk opened it and laid it aside or laid it aside without opening it, in what position would he be to assert that he could undo a sale made to a second bidder upon the theory that he acted under a mistake? The answer at once would be, "You are chargeable with all that information which comes to you regularly, and it is quite idle for you to say that you did not know the facts as soon as the information reached you. The law disregards the question whether you should physically have opened it and read it or not, because that is something entirely between you and the people whom you employ to advise you of what properly comes to you." Therefore, a successful bidder, although a lower bidder, under these circumstances could not be compelled to rescind the sale. Now, it seems to me that is precisely the situation here, that Levinson having with entire good faith got the Bill of Sale and paid the purchase price, cannot be compelled by the Navy Department to rescind that sale, because the Navy Department did not use the information with which the law necessarily charges it.

And so, even if it was the Navy Department itself which attempted to rescind the sale, I should hold against it. But it really is not necessary in this case to go so far as that, because, as Johnson is not by the Statute entitled to the ship as the highest bidder, I cannot see that he has any right even to speak in the name of the Navy Department. The Navy Department has never accepted his bid, and it is well known law, which requires no citation of authorities, that until the bid is accepted, no contract is made. A mere offer to accept bids, when the bid is made, even the highest bid, does not constitute a contract. So that I should hold, that as the facts stand under this Bill, even though the Navy Department had actually rescinded the sale, as they have not accepted Johnson's bid, Johnson had no standing in this sale.

But I do not want to leave the case in that position, because if I did it would only invite another suit for the Department might then accept Johnson's bid and the question would come up again, and that would cause expense and delay, and as I think that Levinson cannot be deprived of his offer either by the Department or by Johnson, it necessarily follows that the decree must go directing the plaintiff who is the stake holder, to deliver the vessel to Levinson and such a decree may be taken by the plaintiff. There will be no costs.

LEARNED HAND
United States District Judge.

January 31st, 1920.

Order of United States District Judge.

At a Stated Term of the United States District Court for the Southern District of New York, Held in the Post Office Building, Borough of Manhattan, City of New York, on February 4, 1920.

Present: Hon. Learned Hand, U. S. D. J.

UNITED STATES OF AMERICA, Complainant,

against

MORRIS LEVINSON & S. HARRY JOHNSON, Defendants.

This cause came on to be heard before me at the February Term of this Court and having been argued by counsel upon due deliberation thereof, it is

24 Ordered, adjudged and decreed that the defendant Morris Levinson is entitled to the possession of the said steam yacht "Wadena," and the stakeholder, the United States of America, is hereby directed immediately after receiving payment of the sum of $5,150, the amount of the bid of said Morris Levinson to deliver to the said Morris Levinson the said steam yacht "Wadena," and it is Further ordered, adjudged and decreed that no costs be taxed herein.

(Sgd.) LEARNED HAND,
U. S. D. J.

Executive Order.

January 7, 1919.

Under the authority of the Act of Congress, Chapter 141, Section 5, approved March 3, 1883, it is hereby ordered that all vessels, boats and auxiliary ships of the Navy classified as yachts, colliers, transports, tenders, supply ships, hospital ships, submarine chasers, patrol boats, motor boats, fishing vessels, and special types purchased or commandeered for a substantial consideration by the Navy subsequent to the declaration of congress by joint resolution approved April 6, 1917, that war exists between the United States and Germany, and provided said vessels were purchased or commandeered for the purposes of said war, be appraised by a board of officers to be designated for this duty by the Secretary of the Navy and sold by the said Secretary to the former owners of said vessels at the appraised

25 value thereof; provided, said former owners are desirous of purchasing said vessels and are willing to pay the amount of said appraisal in each case; and provided further, that, if the former owners of said vessels are not desirous of purchasing said vessels at and for the amount of the said appraisal, the Secretary of the Navy shall advertise and sell at public sale any and all of said vessels, which are, in his opinion not necessary for the needs of the Navy, for such price as he shall approve.

It is hereby further ordered that the Secretary of the Navy sell, at public sale, such materials and equipment of vessels, boats and auxiliary ships of the Navy as above described, said materials and equipment consisting of masts, bowsprits, sails, boats, anchors, tackle, furniture, and all other necessaries appertaining and belonging to such vessels, boats and auxiliary ships as, in his judgment, cannot be advantageously used, repaired or fitted out.

(Signed) WOODROW WILSON.

The White House,
7 January, 1919.

(No. 3021.)

26 *Petition for Appeal.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, Appellant,

against

MORRIS LEVINSON, Appellee, and S. HARRY JOHNSON, Appellant.

To the Honorable Judges of the United States District Court for the Southern District of New York:

S. Harry Johnson, one of the above-named appellants, feeling aggrieved by the final judgment entered herein on the 4th day of February, 1920, by which it is ordered adjudged and decreed that the appellee, Morris Levinson, is entitled to the possession of the Steam Yacht "Wadena," and in and by which order the United States of America, one of the above-named appellants, is directed immediately after receiving payment of the sum of Five thousand one hundred and fifty dollars ($5,150) to deliver to said Morris Levinson the said Steam Yacht Wadena, does hereby appeal from the said final judgment to the United States Circuit Court of
27 Appeals, for the Second Circuit, for the reasons specified in the Assignments of Error, which are filed herein, and the said S. Harry Johnson prays that this appeal be allowed and that a transcript of the legal proceedings and papers upon which said final judgment was made, duly authenticated, be sent to the said Court.

Dated, New York, April 1st, 1920.

HENRY AMERMAN,
Solicitor for Appellant S. Harry Johnson.

Office and Post Office Address, 233 Broadway, Borough of Manhattan, New York City.

Assignments of Error.

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, Appellant,

against

MORRIS LEVINSON, Appellee, and S. HARRY JOHNSON, Appellant.

Assignments of Error.

Henry Amerman, solicitor for S. Harry Johnson, one of the above-named appellants, for and on behalf of said S. Harry Johnson, alleges that the judgment of the United States District Court entered herein on February 4th, 1920, is erroneous and against the just rights of the appellant, S. Harry Johnson, for the following reasons:

(1) The Court erred in adjudging and decreeing that the United States of America deliver the Yacht Wadena to Morris Levinson, the appellee, upon the payment of Five thousand one hundred and fifty dollars ($5,150), and its judgment is contrary to law and erroneous, and the Court should have adjudged and decreed that the said vessel be delivered to the appellant, S. Harry Johnson.

(2) The Court erred in holding that by the Statutes and Executive Order, under which the said Yacht Wadena was advertised for sale and sold at public sale, the Secretary of the Navy was authorized and empowered to sell the said Yacht to Morris Levinson, the appellee, although he was not the highest bidder.

(3) The Court erred in holding that by the Statutes and Executive Order, under and by virtue of which the Secretary of the Navy was authorized to sell said Yacht Wadena, the Secretary of the Navy could approve the bid of Morris Levinson, the appellee, even though the offer for sale provided that said vessel should be sold for cash to the highest bidder and the said Secretary of the Navy had received a bid from the appellant, S. Harry Johnson, which bid was higher than the one received from the appellee, Morris Levinson.

(4) The Court erred in holding that under the Statutes and Executive Order, the Secretary of the Navy could, in his discretion, reject the highest bid for the Steam Yacht Wadena and accept a lower bid therefor.

(5) The Court erred in holding that the appellant, S. Harry Johnson, the highest bidder for said Yacht Wadena, and whose bid has not been rejected, was not entitled to the delivery of said Yacht under the Statutes, Executive Order and Offer of Sale.

(6) The Court erred in holding that the Secretary of the Navy in exercising his discretion in accepting the bid of the appellee,

Morris Levinson, thereby rejected the bid of the appellant, S. Harry Johnson, who was the highest bidder.

(7) The Court erred in not holding that the acceptance of the bid of the appellee, Morris Levinson, was made through a mutual mistake of fact by the Secretary of the Navy and said Morris Levinson, which mistake of fact should have been corrected by the Court, and the said appellant, S. Harry Johnson, adjudged and decreed to be entitled to the delivery of said Yacht Wadena.

Wherefore the appellant, S. Harry Johnson, prays that the order of the United States District Court dated February 4th, 1920, be reversed and that the Court direct that the appellant, S. Harry Johnson, be entitled to the possession of the Steam Yacht Wadena.

Dated, New York, April 1st, 1920.

HENRY AMERMAN,
Solicitor for Appellant S. Harry Johnson.

Office and Post Office Address, 233 Broadway, Borough of Manhattan, New York City.

30 *Order Allowing Appeal.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, Appellant,

against

MORRIS LEVINSON, Appellee, and S. HARRY JOHNSON, Appellant.

The defendant S. Harry Johnson having filed a petition for appeal from the decree made and entered herein on the 4th day of February, 1920, it is

Ordered that the said appeal of the said defendant, S. Harry Johnson, from said decree to the United States Circuit Court of Appeals, for the Second Circuit, be and the same hereby is allowed; and it is

Further ordered that the defendant, S. Harry Johnson, file a bond in the sum of Two hundred and fifty dollars ($250) on or before the 9th day of April, 1920, the same to act as a bond for costs on appeal.

Dated, New York, April 3rd, 1920.

LEARNED HAND,
D. J.

31 *Notice of Appeal.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, Appellant,

against

MORRIS LEVINSON, Appellee, and S. HARRY JOHNSON, Appellant.

SIRS: Please take notice that S. Harry Johnson, one of the defendants herein, hereby appeals to the United States Circuit Court of Appeals, for the Second Circuit, from the final decree entered herein on February 4th, 1920.

Dated, New York, April 1st, 1920.

HENRY AMERMAN,
Solicitor for Defendant-Appellant S. Harry Johnson.

Office and Post Office Address, 233 Broadway, Borough of Manhattan, New York City.

To:

Duncan & Mount, Esqs., Attorneys for Appellee, Morris Levinson, 27 William Street, New York City.

Francis G. Caffey, Esq., Attorney for Appellant The United States of America, Post Office Building, New York City.

32 *Citation on Appeal.*

By the Honorable Learned Hand, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to Morris Levinson, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 6th day of May, 1920, pursuant to a Notice of Appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein the United States of America and S. Harry Johnson are appellants, and you are Appellee to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 6th day of April, in the year of our Lord One Thousand Nine Hundred and twenty, and of the Independence of the United States the One Hundred and Forty-fourth.

LEARNED HAND,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

33 *Notice of Appeal and Allowance Thereof.*

United States District Court, Southern District of New York.

In Equity. 17–36.

UNITED STATES OF AMERICA, Appellant,

against

MORRIS LEVINSON, Appellee, and S. HARRY JOHNSON, Appellant.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The above named appellant, United States of America, feeling aggrieved by the final judgment entered herein on the 4th day of February, 1920, by which it is ordered, adjudged and decreed that the appellee Morris Levinson is entitled to the possession of the steam yacht "Wadena" and in which the United States of America, appellant, is directed immediately after receiving payment of the sum of $5,150 to deliver to the said Morris Levinson the said steam yacht, does hereby appeal from the said final judgment to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignments of error which are filed herein, and the said United States of America prays that
34 this appeal will be allowed and that a transcript of the [illegible] proceedings and papers upon which the said final judgment was made, duly authenticated, may be sent to the said court.

Dated, New York, N. Y., April 5, 1920.

FRANCIS G. CAFFEY,
United States Attorney for the Southern District of New York, Attorney for Appellant United States of America.

Office & P. O. Address, United States Courts and Post Office Building, Borough of Manhattan, City of New York.

The foregoing appeal is hereby allowed.

J. M. MAYER,
U. S. D. J.

Dated, New York, N. Y., April 5, 1920.

35 *Assignments of Error.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, Appellant,

against

MORRIS LEVINSON, Appellee, and S. HARRY JOHNSON, Appellant.

Francis G. Caffey, United States Attorney for the Southern District of New York, attorney for the United States of America, appellant in the above-entitled case in its behalf alleges that the judgment of the United States District Court entered herein on February 4, 1920, is erroneous and against the just rights of the appellant for the following reasons:

1. The Court erred in adjudging and decreeing that the appellee Morris Levinson is entitled to the possession of the steam yacht "Wadena" upon payment of $5,150, and said judgment is erroneous and contrary to law and should have adjudged and decreed that the appellant, S. Harry Johnson, is entitled to the possession of said yacht upon payment by him of the amount of his bid of $6,500.

2. The Court erred in holding that under the Statutes and the Executive Order by virtue of which the said yacht was
36 offered for sale to the highest bidder, the Secretary of the Navy was authorized to sell the yacht to the appellee Morris Levinson who was not the highest bidder therefor.

3. The Court erred in holding that under the Statutes and Executive Order by virtue of which the Secretary of the Navy was authorized to sell the said yacht the said Secretary of the Navy was authorized to sell the same to Morris Levinson after said yacht had been offered for sale to the highest bidder and the appellant, S. Harry Johnson, complying with all the requirements, had made a bid of $6,500 for said yacht, which bid had been duly received by the Secretary of the Navy and which bid was higher than the bid of $5,150 of said appellee Morris Levinson.

4. The Court erred in not holding that the award of the yacht to said appellee Morris Levinson was made through a mutual mistake of fact on behalf of the Secretary of the Navy and said Morris Levinson, which mistake of fact should have been corrected by the Court, and the said appellant, S. Harry Johnson, adjudged and decreed to be entitled to possession of the said yacht upon payment of the amount of his said bid.

Wherefore, the United States of America, appellant, prays that the judgment of the United States District Court entered on February 4, 1920, be reversed and that the Court direct that the appellant,

S. Harry Johnson, is entitled to the possession of said yacht upon payment of the amount of his bid of $6,500.

Dated, New York, N. Y., April 5, 1920.

FRANCIS G. CAFFEY,
United States Attorney for the Southern District of New York, Attorney for Appellant United States of America.

Office and Post Office Address, United States Courts and Post Office Building, Borough of Manhattan, City of New York.

Citation on Appeal.

By the Honorable Julius M. Mayer, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to S. Harry Johnson and Morris Levinson, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 3rd day of May, 1920, pursuant to an order allowing an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein United States of America is the appellant and you are respectively appellant and appellee, to show cause, if any there be, why the judgment in said action mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 5th day of April, in the year of our Lord One Thousand Nine hundred and twenty, and of the Independence of the United States the One Hundred and forty-fourth.

J. M. MAYER,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

39 *Stipulation.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, Appellant,

against

MORRIS LEVINSON, Appellee, and S. HARRY JOHNSON, Appellant.

It is hereby stipulated by and between the attorneys for the respective parties hereto that the appeal in the above entitled action may be consolidated and printed as one record.

Dated, New York, April 6th, 1920.

FRANCIS G. CAFFEY,
United States District Attorney,
Attorney for Appellant United States of America.
DUNCAN & MOUNT,
Attorneys for Appellee, Morris Levinson.
HENRY AMERMAN,
Attorney for Appellant, S. Harry Johnson.

40 *Stipulation as to Record.*

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter, as agreed on by the parties.

Dated, April 9th, 1920.

FRANCIS G. CAFFEY,
United States District Attorney,
Attorney for Appellant United States of America.
DUNCAN & MOUNT,
Attorneys for Appellee, Morris Levinson.
HENRY AMERMAN,
Attorney for Appellant, S. Harry Johnson.

41 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

UNITED STATES OF AMERICA, Appellant,

against

MORRIS LEVINSON, Appellee, and S. HARRY JOHNSON, Appellant.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do

hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed upon by the parties.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 9th day of April in the year of our Lord one thousand nine hundred and twenty and of the Independence of the said United States the one hundred and forty-fourth.

ALEX. GILCHRIST, Jr.,
[SEAL.] *Clerk.*

42 *Opinion C. C. A.*

United States Circuit Court of Appeals for the Second Circuit, October Term, 1919.

No. 241.

UNITED STATES, Complainant-Appellant,

vs.

MORRIS LEVINSON, Defendant-Appellee; S. HARRY JOHNSON, Defendant-Appellant.

Argued April 23, 1920; Decided June 9, 1920.

Appeal from the District Court of the United States for the Southern District of New York.

Before Ward, Hough, and Manton, Circuit Judges.

Francis G. Caffey, United States Attorney, for United States.
Peter B. Olney, Jr., Assistant U. S. Attorney of Counsel.
43 Duncan & Mount, for Defendant-Appellee.
John A. McManus, of Counsel.
Henry Amerman, for Defendant-Appellant.

WARD, *Circuit Judge:*

Section 5 of the Act of March 3, 1883, relating to the sale of vessels stricken from the Navy register requires an appraisal to be made and advertisement for sealed proposals, the vessel to be sold to the highest bidder above the appraised value unless the President of the United States shall otherwise direct in writing.

January 7, 1919, the President directed that all vessels purchased or commandeered by the Government during the war between the United States and Germany be appraised and sold to the former owners at the appraised values and that if they are not desirous of purchasing "the Secretary of the Navy shall advertise and sell at public sale any and all of said vessels which are in his opinion not

necessary for the needs of the Navy at such price as he shall approve."

July 11, 1919, the Secretary of the Navy having advertised among other vessels the steam yacht Wadena for sale August 20th for cash to the highest bidder, one Levinson submitted a bid of $5,150 and one Johnson a bid of $6,500, both in full compliance with the terms of sale. Through inadvertence in the offices of the Navy Department Johnson's bid was placed with the bids for another vessel named the Wandena to be sold September 8, which bids were opened eighteen days after the bids for the Wadena had been opened. In the meantime the Secretary notified Levinson that his bid had been accepted, it being the highest known to him. Levinson paid the amount and a bill of sale was given to him September 3, 1919.

September 8, when the bids for the Wandena were opened Johnson's bid for $6,500 for the Wandena was found and the Navy Department stopped delivery of the Wandena to Levinson, returned to the checks given in payment and requested a return of the bill of sale. This Levinson refused to do, at the same time returning the checks with the claim that title to the vessel had passed to him. Johnson has offered to pay the full amount of his bid and has demanded the delivery of the vessel to him as the highest bidder.

Thereupon the Government filed this bill of interpleader, setting forth the foregoing facts and both of the bidders filed answers, admitting the allegations of the bill.

The trial judge directed that the vessel be delivered to Levinson on the ground that having under the executive order a discretion to accept or reject bids the Secretary had accepted Levinson's. Johnson has taken this appeal and so has the Government by direction of the Attorney General.

Though no party objected to the jurisdiction in equity of this bill the trial judge raised the question whether it was a proper bill of interpleader or bill in the nature of interpleader. We think he was right in holding that it was. The Government is in possession of the vessel. Two different bidders are claiming it and the Government does not know to which bidder to deliver it. This is a typical case for a bill of interpleader. The only difficulty is that the Secretary of the Navy having delivered the bill of sale to one of the parties has an interest and is not a mere stakeholder if the Government is to be treated like a private suitor. On the other hand if it is not bound by the mistake in the Navy Department, a question now to be considered, it remains a mere stakeholder without interest.

The Secretary of the Navy intended to sell the vessel to the highest bidder and so stated in the offer of sale. Although he reserved in the notice of sale the right to reject any and all bids he did not reject or intend to reject Johnson's bid because he did not know of its existence. The effect of the authority given him by the executive order to sell for such price as he shall approve is only to relieve him of the restriction of the Act of 1883 that a bid to be accepted must

be more than the appraised value and to permit him to reject all bids if they be wholly inadequate.

It was argued that the sale to Levinson should be set aside because made under a mutual mistake. The District Judge was of opinion that there was no mutual mistake and that because knowledge of Johnson's bid which came to the Navy Department through the mail is to be imputed to the Government just as such knowledge
46 would be imputed to a private party although by a mistake of his agent he had no actual knowledge. In this we cannot concur. The relation of the Government to its agents is different from that of private parties. To bind the Government its agent must act strictly within his official authority and everyone who deals with him takes the risk of his doing so. The subject has not been frequently considered but is treated of in United States v. Stock Growers Association, 30 Fed. Rep., 912; The Floyd Acceptances, 7 Wall., 666; Cooke v. United States, 91 U. S. 389; Steele v. United States, 113 U. S., 128.

The Secretary agreed to sell the Wadena to the highest bidder and this he supposed he was doing when he accepted Levinson's bid. He exercised and intended to exercise no discretion to accept anything but the highest bid. He had no authority to do so under the notice of sale. Therefore in delivering the bill of sale to Levinson he acted without authority to bind the Government. It is necessary as matter of public policy that the Government be protected in this way against liabilities unlimited in number and amount resulting from the mistakes or misconduct of its agents.

It is further contended on behalf of Levinson that the Government in selling the vessel had descended into commercial business and abandoned its sovereign capacity. We are of opinion that in selling vessels not needed by the Navy it exercises a governmental function and does not go into business. The case is not at all like a department buying, carrying and selling merchandise as was disclosed in the case of the Panama Railroad, owned by the
47 United States, Salas v. United States, 234 Fed. Rep., 812.

We are of opinion that the United States being a mere stakeholder has no standing to take an appeal and its appeal is dismissed, but that the Secretary having no authority to deliver the bill of sale to Levinson and being bound to deliver it to Johnson as the highest bidder, the decree must be reversed.

Hough, C. J., dissents.

48 *Order for Mandate.*

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 19th Day of June, One Thousand Nine Hundred and Twenty

Present: Hon. Henry G. Ward, Hon. Charles M. Hough, Hon. Martin T. Manton, Circuit Judges.

UNITED STATES, Complainant-Appellee,

vs.

MORRIS LEVINSON, Defendant-Appellee; HARRY JOHNSON, Defendant-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

49 This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is reversed with costs to the appellant Johnson. Further ordered that the appeal of the complainant be and it hereby is dismissed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree

H. G. W.
C. M. H.

Endorsed: United States Court of Appeals, Second Circuit. U. S. v. Levinson & Johnson. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed June 22, 1920. William Parkin, clerk.

50 United States Circuit Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, Complainant-Appellant,

against

MORRIS LEVINSON, Defendant-Appellee, and S. HARRY JOHNSON, Defendant-Appellant.

SIRS

Please take notice that Morris Levinson, one of the defendants herein, hereby appeals to the Supreme Court of the United States from the final decree entered herein on June 22, 1920.

Dated, New York, September 10, 1920.

Yours, etc.,

DUNCAN & MOUNT,
Solicitors for Defendant Morris Levinson

Office & Post Office Address, 27 William Street, New York City.

To

Henry Ammerman, Esq., Solicitor for Defendant Harry Johnson, 233 Broadway, New York City.

Francis G. Caffey, Esq., United States Attorney, Post Office Building, New York City.

51 United States Circuit Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, Complainant-Appellant,

against

MORRIS LEVINSON, Defendant-Appellee, and S. HARRY JOHNSON, Defendant-Appellant.

Petition for Appeal

To the Honorable the Judges of said court:

Morris Levinson, a defendant in the above entitled action, feeling himself aggrieved by the final decree of this Court entered herein on the 22nd day of June, 1920, hereby prays that an appeal may be allowed to him from the said decree to the Supreme Court of the United States, and that a transcript of the legal proceedings and papers upon which said final decree was made, duly authenticated, be sent to said Court, and in connection with this petition petitioner presents herewith his assignment of errors.

New York, September 10, 1920.

DUNCAN & MOUNT,
Solicitors for Defendant-Appellee Morris Levinson.

Office & Post Office Address, 27 William Street, Borough of Manhattan, New York City.

52 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, Complainant-Appellee,

against

MORRIS LEVINSON, Defendant-Appellee, and S. HARRY JOHNSON, Defendant-Appellant.

Order Allowing Appeal.

Morris Levinson, a defendant herein, having filed a petition for an appeal from the decree made and entered herein on the 22nd day of June, 1920, it is

Ordered, that the said appeal of the said Morris Levinson from said decree to the Supreme Court of the United States be and the same hereby is allowed; and it is further

Ordered, that the defendant-appellee Morris Levinson file a bond in the sum of Two hundred and fifty Dollars ($250) on or before the 22nd day of September, 1920, the same to act as a bond for costs on appeal.

Dated, New York, September 16, 1920.

H. G. WARD,
Circuit Judge.

53 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, Complainant-Appellant,

against

MORRIS LEVINSON, Defendant-Appellee, and S. HARRY JOHNSON, Defendant-Appellant.

Assignment of Errors.

Morris Levinson, a defendant in the above entitled action, by Duncan & Mount, his attorneys, in connection with his petition for appeal, says that the decree of the United States Circuit Court of Appeals entered herein on June 22, 1920, is erroneous and against the just rights of the said defendant, for the following reasons:

First. The Court erred in reversing the decree of the District Court heretofore entered herein which ordered delivery of the yacht Wadena to Morris Levinson.

Second. The Court erred in holding that the Secretary of the Navy had no authority to deliver the bill of sale of the said yacht Wadena to Morris Levinson.

Third. The Court erred in holding that the Secretary of the Navy in delivering the bill of sale to Levinson acted without authority to bind the United States of America.

54 Fourth. The Court erred in holding that the Secretary of the Navy exercised no discretion in delivering the bill of sale to Levinson.

Fifth. The Court erred in measuring the extent of the authority of the Secretary of the Navy by the advertisement or notice of sale sent out by the Secretary of the Navy offering the said yacht Wadena for sale.

Sixth. The Court erred in holding that the act of the Secretary of the Navy in delivering the bill of sale to Levinson was not binding on the United States of America because a higher bid was in existence at the time of the delivery of the bill of sale to Levinson, although the Secretary of the Navy had no actual notice of the existence of such higher bid.

Seventh. The Court erred in holding that the Navy Department in selling the yacht Wadena was exercising a Governmental function.

Eighth. The Court erred in ordering the yacht Wadena delivered to S. Harry Johnson.

Wherefore, the appellee, Morris Levinson, prays that the order of the United States Circuit Court of Appeals herein, dated June 22, 1920, be reversed and the order of the United States District Court for the Southern District of New York, dated February 4, 1920, be restored and that the Court direct that the appellant Morris Levinson be entitled to the possession and ownership of the steam-yacht Wadena.

Dated, New York, September 10, 1920.

DUNCAN & MOUNT,

Solicitors for Respondent-Appellee Morris Levinson.

Office & Post Office Address: 27 William Street, Borough of Manhattan, N. Y. City.

55 Circuit Court of the United States of America for the Second Circuit.

UNITED STATES OF AMERICA, Complainant,

v.

MORRIS LEVINSON and S. HARRY JOHNSON, Respondents.

Know all men by these presents:

That we, Morris Levinson, of Newburgh, New York, as Principal, and the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 37 Cedar Street, in the City

of New York, County and State of New York, as surety are held and firmly bound unto the above named United States of America, in the sum of two hundred fifty ($250) dollars, to be paid to the said United States of America, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 14th day of September, 1920.

Whereas the above named Morris Levinson has prosecuted an appeal to the United States Supreme Court, to reverse the decree dated the 22nd day of June, 1920, rendered in the above entitled suit in the United States Circuit Court of Appeals for the Second Circuit.

Now, therefore, the condition of this obligation is such that if the above named Morris Levinson shall prosecute his appeal to effect and answer all damages and costs if he fails to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
By S. FRANK HEDGES,
Attorney in Fact.

Attest:
WILLIAM H. ESTWICK,
[SEAL.] *Attorney in Fact.*

STATE OF NEW YORK,
County of New York, ss:

Before me personally came S. Frank Hedges, known to me to be the attorney in fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Morris Levinson as surety thereon who being by me duly sworn deposes and says that he resides in the City of New York, State of New York, and that he is the attorney in fact of the said United States Fidelity and Guaranty Company and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Morris Levinson is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; that he signed his name thereto by like order and authority, as attorney in fact of said company; and that he is acquainted with William H. Estwick and knows him to be attorney in fact of said company; and that the signature of said William H. Estwick subscribed to said bond is the genuine handwriting of said William H. Estwick and was thereto subscribed by order and authority of said Board of Directors and

in the presence of said deponent; and that the assets of said
57 company unencumbered and liable to execution exceed its claims, debts and liabilities of every nature whatsoever by more than the sum of two million dollars ($2,000,000).

S. FRANK HEDGES.

Sworn to, acknowledged before me, and subscribed in my presence this 14th day of September, 1920.

[SEAL.] J. W. MILLER.
Notary Public, New York County, No. 380.

Register No. 2828.
Certificate filed in Kings County No. 138.
Register No. 2178.
Bronx County No. 25.
Register No. 2266.
Queens County No. 1975.
Putnam, Westchester, Orange, Suffolk, Nassau, Richmond
Rockland Term expires March 30*th*, 1922.

The within undertaking is approved as to form and as to the sufficiency of the surety as a bond for costs.

H. G. WARD,
U. S. C. J.

58 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages numbered from 1 to 57, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States against Morris Levinson and S. Harry Johnson as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 27th day of September in the year of our Lord One Thousand Nine Hundred and Twenty and of the Independence of the said United States the One Hundred and forty-fifth.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

39

E 17-36.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To the United States of America and S. Harry Johnson, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within 30 days from the date hereof, pursuant to an appeal filed in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein Morris Levinson is appellant and you are appellees, to show cause if any there be why the decree rendered against the said appellant as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable H. G. Ward one of the Judges of the United States Circuit Court of Appeals for the Second Circuit, this 16th day of September in the year of our Lord one thousand nine hundred and twenty

H. G. WARD.
United States Circuit Judge.

40 [Endorsed:] E 17-36. U. S. Circuit Court of Appeals for the Second Circuit. United States of America, Complainant-Appellant, vs. Morris Levinson, Defendant-Appellee, and S. Harry Johnson, Defendant-Appellant. Citation. Copy received Sept. 16 20. Francis G. Caffey, U. S. Atty. United States Circuit Court of Appeals, Second Circuit. Filed Sep. 16, 1920. William Parkin, Clerk. Copy received Sept. 16, 1920. Henry Amerman, solicitor for S. Harry Johnson. Duncan & Mount, Counsellors at Law, 27 William Street, New York City.

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Supreme Court of the United States

OCTOBER TERM, 1920.

No. [redacted]145

MORRIS LEVINSON,
Defendant-Appellant,

vs.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

S. HARRY JOHNSON,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT.

JOHN A. McMANUS,
Counsel for Defendant-Appellant.

DUNCAN & MOUNT,
Solicitors.

The Heela Press, 57 Warren St., N. Y. Tel. 6230 Barclay.

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TABLE OF CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 568.

MORRIS LEVINSON,
Defendant-Appellant,

vs.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

S. HARRY JOHNSON,
Defendant-Appellee.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Second Circuit, entered on June 22, 1920 (fol. 49), reversing a decree of the United States District Court for the Southern District of New York, entered February 4, 1920 (fol. 24). The cause was in equity and in the nature of a bill of interpleader, brought by the United States of America, as complainant, against Morris Levinson, defendant-appellant, and S. Harry Johnson, defendant-appellee, praying that it might be decreed which of the defendants was

entitled to the possession of the steam yacht *Wadena*, a vessel advertised for sale July 11, 1919, by the Secretary of the Navy.

Statement of the Case.

On July 11, 1919, the Honorable Josephus Daniels, then Secretary of the Navy, by authority of Executive Order 3021, January 7, 1919, issued under the authority of the Act of March 3, 1883 (fol. 25), published an advertisement calling for bids on certain yachts and motorboats (fol. 3). The advertisement provided that bids for the vessels would be received by the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., until 12 o'clock noon, August 20, 1919, at which time and place the bids would be publicly opened and the vessels sold for cash to the highest bidders (fol. 3). The advertisement further reserved to the Navy Department the right to reject any and all bids (fol. 4). Among the vessels thus advertised for sale was the *Wadena,* a steam yacht of the appraised value of $12,000, then located at the Marine Basin, Ulmer Park, New York (fol. 3). Thereafter the defendant-appellant (hereinafter referred to as Levinson) duly submitted to the Bureau of Supplies and Accounts a bid in writing in the sum of $5,150 for the said *Wadena,* which bid was accompanied by a certified check for $515, being 10 per cent. thereof, as required by the department's advertisement (fol. 6). On August 20, 1919, the bids for the *Wadena* were opened at the bureau and the bid of Levinson was found to be the highest, whereupon the *Wadena* was awarded to him (fol. 7). Thereafter Levinson delivered a

check for the balance of $4,635 to the Navy Department (fol. 6), and on September 3, 1919, the Navy Department gave Levinson a bill of sale of the vessel, which bill of sale was duly executed by the Acting Secretary of the Navy (Exhibit "A," fols. 9, 10).

It subsequently transpired that the defendant-appellee Johnson had also submitted an offer or bid to purchase the *Wadena*, his bid being $6,500 (fol. 6).

The motorboat *Wandena*, a vessel of similar name, had been advertised for sale by the Secretary of the Navy on August 22, 1919. The advertisement called for bids to be received by the Bureau of Supplies and Accounts, the bids to be opened September 8, 1919 (fol. 5). When these bids were opened it was discovered that the bid of the defendant-appellee Johnson for the steam yacht *Wadena* had been filed with the bids on the motorboat *Wandena* (fol. 6). This was five days after a bill of sale of the *Wadena* had been delivered to Levinson, and also three weeks after the opening of the bids for the *Wadena* and the award of the vessel to Levinson. Johnson's offer was $1,350 higher than that of Levinson.

On September 10, 1919, the Navy Department stopped delivery of the *Wadena* and returned both of Levinson's checks to him, requesting that he return the bill of sale. Levinson, however, sent the checks back to the Navy Department, claiming that the title to the vessel had passed to him, refused to surrender the bill of sale, and demanded that the vessel be delivered to him (fol. 7). The Secretary, however, declined to deliver the yacht to Levinson, alleging that Johnson's bid was the high-

est and the vessel should have been awarded to him.

Thereafter the United States brought this suit in equity in the nature of a bill of interpleader in the United States District Court for the Southern District of New York against the defendants Johnson and Levinson, alleging the facts recited above and that the defendant Johnson was ready to pay the full price of his bid, $6,500, and praying that the Court might declare which one of the two defendants was entitled to the vessel (fol. 9).

Each defendant answered admitting the allegations of the bill and praying that the vessel be delivered to him (fols. 11, 13).

The case was submitted on the pleadings to Judge Learned Hand, who, after full argument, held that Levinson was entitled to the vessel. As his opinion shows, Judge Hand decided that the statute and executive order under which the Secretary of the Navy had acted did not require him to sell to the highest bidder, and that the sale to Levinson was legal; also that Johnson acquired no right to the boat and had no standing as the highest bidder. The Court also considered the question whether the sale to Levinson could be rescinded in equity for mutual mistake, and held that it could not be rescinded as there was no mistake on the part of Levinson or the Government, since the Navy Department was chargeable with knowledge of Johnson's bid as an individual would be in like circumstances. A decree was accordingly entered directing the Government to deliver the vessel to Levinson (fols. 15-23).

Despite this decree, obtained at its instance, the Government declined to deliver the *Wadena* to Lev-

inson, and both it and the defendant Johnson appealed to the Circuit Court of Appeals for the Second Circuit. The appeal of the Government was dismissed on the ground that it was a mere stakeholder, and as such should not feel aggrieved by the decision of the District Court, and had no standing whatever to appeal. On Johnson's appeal, however, the decree was reversed by a divided Court. The majority of the Court, in an opinion by Judge Ward, concurred in by Judge Manton, held that the Secretary of the Navy had no authority to deliver the bill of sale to Levinson, but was bound to deliver it to Johnson as the highest bidder. Judge Hough dissented without opinion.

Specifications of Error.

The assignments of error show appellant's contention to be that the Circuit Court of Appeals erred in the following respects:

In reversing the decree of the District Court; in holding that the Secretary of the Navy had no authority to deliver the vessel to Levinson, and that his act in doing so was not binding on the United States; in ordering the *Wadena* delivered to Johnson; and in measuring the extent of the Secretary's authority by statements contained in the notice of sale.

POINT I.

The Secretary of the Navy in accepting Levinson's bid acted within the scope of his authority as created and governed by the statutes and Executive Order No. 3021, and the bill of sale is therefore binding on the United States and vested title in Levinson.

Section 5 of the Act of March 3, 1883 (Ch. 141, 22 Stat., 600), provides for the sale of vessels stricken from the Navy Register under the provisions of the Act of August 5, 1882 (22 Stat., 296). It requires an appraisal to be made, and advertisement for sealed proposals, which must be accompanied by cash deposit of 10 per cent. and a bond to secure payment of balance of bid, if accepted, and directs that vessels be sold after three months' advertising to the highest bidder above the appraised value. This section is printed in the footnote.*

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*"(Act March 3, 1883, c. 141, Sec. 5.) APPRAISAL AND SALE OF VESSELS STRICKEN FROM NAVY REGISTER AS UNFIT FOR SERVICE. It shall be the duty of the Secretary of the Navy to cause to be appraised, in such manner as may seem best, all vessels of the Navy which have been stricken from the Navy Register under the provisions of the act making appropriations for the naval service for the fiscal year ending June thirtieth, eighteen hundred and eighty-three, and for other purposes, approved August fifth, eighteen hundred and eighty-two. And if the said Secretary shall deem it for the best interest of the United States to sell any such vessel or vessels, he shall, after such appraisal, advertise for sealed proposals for the purchase of the same, for a period not less than three months, in such newspapers as other naval advertisements are published, setting forth the name and location and the appraised value of such vessel, and that the same will be sold, for cash, to the person or persons or corporation or corporations offering the highest price therefor above the appraised value thereof; and such proposals shall be opened on a day and hour and at a place named in said advertisement, and

It concludes as follows:

> "But no vessel of the navy shall hereafter be sold *in any other manner than herein provided, or for less than such appraised value, unless the President of the United States shall otherwise direct in writing.*"

The President by the aforementioned executive order dated January 7, 1919 (quoted Record, fol. 25), directed the appraisal, by a naval board, of various vessels previously purchased or commandeered by the Government for the use of the navy in prosecuting the war with Germany, and their sale to their former owners at the appraised value, if the former owners desired to repurchase them. The order also provided that if the former owners did not care to repurchase the vessels at the appraised value, the Secretary should advertise and

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record thereof shall be made. The Secretary of the Navy shall require to accompany each bid or proposal a deposit in cash of not less than ten per centum of the amount of the offer or proposal, and also a bond, with two or more sureties to be approved by him, conditioned for the payment of the remaining ninety per centum of the amount of such offer or proposal within the time fixed in the advertisement. And in case default is made in the payment of the remaining ninety per centum, or any part thereof, the Secretary, within the prescribed time thereof, shall advertise and resell said vessel under the provisions of this Act. And in that event said cash deposit of ten per centum shall be considered as forfeited to the government, and shall be applied, first, to the payment of all costs and expenditures attending the advertisement and resale of said vessel; second, to the payment of the difference, if any, between the first and last sale of said vessel; and the balance, if any, shall be covered into the Treasury: Provided, however, That nothing herein contained shall be construed to prevent a suit upon said bond for breach of any of its conditions. Any vessel sold under the foregoing provisions shall be delivered to the purchaser upon the full payment to the Secretary of the Navy of the amount of such proposal or offer; and the net proceeds of such sale shall be covered into the Treasury. But no vessel of the Navy shall hereafter be sold in any other manner than herein provided, or for less than such appraised value, unless the President of the United States shall otherwise direct in writing" (22 Stat., 599).

sell them at public sale if, in his opinion, they were not necessary for the needs of the navy, "at such price as he shall approve." The *Wadena* was covered by this executive order.

(a) The Secretary of the Navy acted within the scope of his authority in delivering the bill of sale to Levinson.

The Secretary, in advertising for offers for the yacht *Wadena*, purported to act under authority of said executive order. No question has been raised as to the validity of this executive order, or that it was a legitimate exercise of the authority of the President conferred by the above-quoted clause of Section 5 of the Act of March 3, 1883.

The first point to be determined, then, is whether the Secretary did or did not exceed his authority as conferred by the executive order in accepting Levinson's bid and in delivering to Levinson a bill of sale of the *Wadena*. If the executive order authorized the delivery of the bill of sale to Levinson, it seems clear that title passed to him upon the acceptance of his checks and the delivery to him of the bill of sale, and that the District Court was right in deciding that Levinson, and not Johnson, was entitled to the possession of the yacht. The question is one of construction of the power conferred upon the Secretary by the executive order. The District Court construed the order broadly and as fully authorizing the sale to Levinson. The Circuit Court of Appeals, on the other hand, gave a very narrow interpretation to the order. It said (fol. 45):

> "The effect of the authority given him by the executive order to sell for such price as

> he (the Secretary) shall approve, is only to relieve him of the restriction of the Act of 1883 that a bid to be accepted must be more than the appraised value, and to permit him to reject all bids if they be wholly inadequate."

Upon this interpretation the Court held that the Secretary had no authority to deliver the bill of sale to Levinson, and, on the contrary, was bound to deliver it to Johnson as the highest bidder.

The opinion does not outline the reasons which led the majority of the Court to conclude that the effect of the order was so restricted. The executive order itself does not contain any *express* provision so limiting the authority of the Secretary and requiring him to accept the highest bid if it is deemed adequate by him. It purports to make legal any sale of the vessels referred to therein, made by the Secretary at public sale, for a price approved by him. Should any such implied limitation be read into the order?

The object of the executive order, as appears from the order itself, was to provide for the return of the vessels therein referred to, to the former owners at the appraised value if they wanted them at that price; if not, then its further object was to provide for the sale, at public sale, of such ones of them as the Secretary considered "not necessary for the needs of the Navy." To accomplish this object the President opened wide the door of the Secretary's authority, telling him to sell the vessels at whatever price he should approve, and, in terms, imposed upon him only one restriction, viz., that the sale must be open and public. This restriction was, of course, a potent check upon the conduct of

the Secretary. If he accepted a very low bid in preference to much higher bids, he would thereby subject himself to criticism unless he had good cause for doing so. So it seems very likely that the President considered this restriction as sufficient check upon the exercise of the Secretary's discretion.

It may be helpful in trying to reach the true construction of this executive order to point out in detail the differences between the executive order and the statute, some of which are expressly stated in the executive order and some of which were inferred to exist by the Secretary, as his conduct in the advertisement and sale of the vessels shows.

1. The Secretary was required by the executive order to offer the vessels to their former owners at the appraised value.

2. The executive order did not require that the advertisement be published "for a period not less than three months" as the statute required. The Secretary so construed the executive order, for in his advertisement of sale he did not follow the statute, but, as the bill of complaint shows (fol. 3), the advertisement was dated July 11, 1919, and provided that bids for the vessels would be received until 12 o'clock noon, August 20, 1919—a period of less than six weeks.

3. The statute obligated the Secretary to require each bid to be accompanied by a deposit *in cash* of not less than 10 per cent. of the amount of the offer, and also a bond with two or more sureties to be approved by him conditioned for the payment of the remaining 90 per cent. of the amount of such offer or proposal within the time fixed in the advertisement. The executive order simply required the

Secretary to "advertise and sell at public sale," and in his advertisement the Secretary did not insist upon *cash*, but required the bid to be accompanied "by either cash deposit, satisfactory certified check, Liberty Bonds or a guaranty bond (personal or surety), in a sum equal to and not less than 1/10th of the amount bid." He did not require the statutory bond for the payment of the remaining 90 per cent., but provided for forfeiture to the Government of the 10 per cent. deposit in case full payment of an accepted bid was not made (fols. 3 and 4).

4. The statute gave the Secretary no discretion —merely requiring him to sell to the highest bidder above the appraised value, whereas the executive order not only relieved him of the obligation to accept the highest bid above the appraised value, but expressly permitted him to accept any bid which he should approve. The executive order certainly did not by express terms require him to accept the highest bid, whether it was under or above the appraised value.

This analysis indicates that the executive order did in fact remove all restrictions upon the Secretary's actions in the sale of these boats, both as to the mode of sale, and as to price, except that any sale made by the Secretary would have to be public, and receive the approval of the Secretary. The result was to give the Secretary a free hand to get rid of all surplus boats by advertising and selling them at public sale for such price as he should approve.

If the effect of the executive order were, as the Circuit Court of Appeals says, merely to relieve the Secretary of the obligation to sell *above* the

appraised value and to permit him to reject all bids if they were wholly inadequate, then the simplest and easiest way to word the executive order would have been to authorize a sale to the highest bidder without more. But no one except the majority of the Circuit Court of Appeals has so construed the effect of the order; not even the Government or the other defendant.

Indeed, the Government in its brief below (p. 9) said:

> "Under the executive order, to be sure, the Secretary of the Navy was authorized to sell the yacht at public auction 'for such price as he shall approve.' Under this authority, the Secretary of the Navy could, of course, if he had taken steps appropriate to that end, have sold the boat to another than the highest bidder."

Neither did the defendant Johnson in his brief below dispute the fact that the Secretary had authority to sell to another than the highest bidder. On page 8 of his brief Mr. Johnson's attorney wrote:

> "The utmost that could be claimed for this (Executive Order) was that it conferred upon the Secretary the power to exercise the Presidential discretion to depart from sales to the highest bidder. The Secretary, however, did not do this * * *."

The two judges, therefore, who concurred in the opinion below are alone in suggesting that the sale to Levinson was outside the scope of the Secretary's authority, and we most respectfully submit that the interpretation placed upon the order by the Circuit Court of Appeals is not sustained by the lan-

guage of the order or its evident purpose; that, on the contrary, the executive order and the statute are broad enough to authorize the sale to Levinson. If this be true, it is of no consequence whether the Secretary in fact exercised no discretion because of lack of knowledge of Johnson's bid, or whether he *intended* to sell to anyone other than the highest bidder or not. His intention in acting under the authority given him plays no part in determining what that authority was. The Secretary had the power to sell to Levinson under the circumstances disclosed in the bill of complaint, and his acceptance of Levinson's bid constituted an approval thereof which bound the Government. The delivery of the bill of sale thereafter to Levinson only executed the contract already made and operated to put the title to the vessel in Levinson.

(b) The Secretary of the Navy could not limit his authority by his advertisement of sale.

Although the Government and the defendant Johnson in the Circuit Court of Appeals did not question the authority of the Secretary to sell to another than the highest bidder, they both argued that, since the Secretary stated in his advertisement for bids that he would sell to the highest bidder, he was bound to do so, and the acceptance of any bid other than the highest bid was illegal. This argument appears to have influenced the Circuit Court of Appeals, for it says (fol. 46) that the Secretary *agreed* to sell the *Wadena* to the highest bidder, and supposed he was doing so when he accepted Levinson's bid; that he exercised and intended to exercise no discretion to accept anything but the highest bid, and that he had no authority to

do so *under the notice of sale*. It is respectfully submitted that the notice of sale or advertisement for bids could not, in any sense, define or determine the scope of the Secretary's authority. The notice of sale was his own act, and not the act of his principal delegating and defining his authority. The Court is not concerned with the Secretary's intentions or his mistakes unless they afford ground for the equitable relief of rescission of the contract, which is not prayed for; the theory of the suit being that title is either in Levinson by virtue of the bill of sale or in Johnson by virtue of the fact that his offer was the highest. Passing for the moment the point whether Johnson's bid was, in fact, the highest bid, since it was not communicated to the Secretary of the Navy, the notice of sale or advertisement for bids was, of course, merely a solicitation for offers. It is fundamental that a solicitation for offers does not bind the person soliciting the offers to accept any offer, and does not bind the bidder prior to acceptance of his bid. Either side may withdraw before the offer is accepted; until that time there is no sale.

> *Pollock on Contracts, by Wald (Williston,* 3rd Am. Ed.), page 15.
> 13 *Corpus Juris,* page 288, Section 96.

This Court has held in the case of *Blossom* v. *Railroad Company*, 3 Wall., 196, that the highest bidder at a judicial sale at public auction, where the sale was adjourned for sufficient cause and finally discontinued, cannot insist on leave to pay the amount of his bid and have a confirmation of the sale to him. The subject is treated at pages 205 and 206 of the report.

In the case of *United States ex rel. Goldberg* v. *Von L. Meyer*, 37 App. D. C., 282, 1911, the Court said at page 288:

> "It is settled law that an auction sale, whether made by a private owner or by an officer under execution of a decree, is not complete until the bid shall have been accepted, and the property struck off and declared sold to the bidder. The seller may decline to accept the bid and may withdraw the property from sale. Until acceptance of his bid the bidder acquires no title to the property. *Blossom* v. *Milwaukee & C. R. Co.*, 3 Wall., 196, 206; 18 L. Ed., 43-46. We perceive no difference in a sale made at public outcry and one made in the manner prescribed by Statute. In each case it is an offer for sale to the highest bidder, and no sale is made until the bid is accepted. Here, notwithstanding the relator's bid was the highest, and its acceptance might have been advisable, the representative of the Government charged with the conduct of the case decided not to accept it, and therefore no sale was actually made."

This case was affirmed by this Court (*sub nom. United States ex rel. Goldberg* v. *Daniels*) in 231 U. S., 218.

It has been shown above that the statute as modified by the executive order did not obligate the Secretary to sell to the highest bidder, and it has also been shown that a mere notice of sale or advertisement, such as this, did not in any way obligate the Secretary, hence it follows necessarily that the statement in the notice of sale that the Secretary would sell to the highest bidder was in no way binding upon him in the sense that the highest bidder acquired any right to the vessel advertised.

(c) Johnson acquired no right in the vessel, for his offer was never accepted.

By bringing the bill of interpleader the Government concedes the title to be legally or equitably in either Levinson or Johnson. The case of *United States ex rel. Goldberg* v. *Daniels, supra*, is conclusive upon the point that Johnson could acquire no right to the vessel unless and until his bid was accepted, which it never was. This case arose under the same statute involved in the case at bar. The petitioner bid more than the appraised value, sent a certified check for the whole sum bid, his bid was the highest, but the Secretary of the Navy refused to deliver the vessel and sent back the check. The Secretary's refusal to accept the bid was due to the Government's having decided to lend the vessel to the Governor of Oregon for use by the militia of that State. The petition was for mandamus directing the Secretary of the Navy to deliver the vessel, which was the United States cruiser *Boston*, to the petitioner. This Court held that the United States could not be made a party to such a suit and that the suit must accordingly fail, but in the opinion by Mr. Justice Holmes the Court stated that it saw no reason for throwing doubt upon the reasoning of the lower Court to the effect that the Government was not bound for the reason that the petitioner's bid had not been accepted.

It is thus seen that the title to the vessel cannot possibly be in Johnson, and that he has no standing as the highest bidder. On the other hand, title vested in Levinson immediately upon the acceptance of his bid and the delivery of the bill of sale, because the acceptance of his bid and the delivery

of the bill of sale, being authorized, was binding upon the Government.

(d) The acceptance of Levinson's bid bound the Government and title passed to him.

The effect of acceptance of a bid by an agent of the United States, acting within the scope of his authority, was considered by this Court in the cases of *Garfielde* v. *United States*, 93 U. S., 242 (1876), and *United States* v. *Parcell Envelope Co.*, 249 U. S., 313 (1919). In the case first cited the Post Office Department by public notice invited proposals for conveying the mails on route No. 13,132, giving full particulars and concluding, "Proposals invited to begin at Port Townsend (W. T.), five hundred miles less. Present pay, $34,800 per annum." The plaintiff under this advertisement made a bid of $26,000, which was accepted by the Postmaster General on March 2, 1874. On April 18, 1874, the plaintiff was notified that his "proposal" was suspended; and the department later made a contract with one Otis for the same route for $34,800. Plaintiff's petition was dismissed in the Court of Claims, and in his appeal it was held that he was entitled to one month's compensation, since the regulations provided for the cancellation of such contracts upon a month's notice, and such regulations were binding on the plaintiff. The Court found that the contract was binding upon the Government. The Court said at page 244:

> "The Court of Claims holds that the proposal on the part of Garfielde, and the acceptance of the proposal by the department, created a contract of the same force and effect as if a formal contract had been writ-

> ten out and signed by the parties. Many authorities are cited to sustain the proposition. We believe it to be sound, and that it should be so held in the present case."

In *United States* v. *Purcell Envelope Company*, *supra*, the Post Office Department advertised for bids for furnishing stamped envelopes and newspaper wrappers in such quantities as might be called for by the department during a period of four years. The envelope company submitted a bid in the manner and at the time specified in the advertisement. The bid was accepted by the Government and a "contract in quadruplicate" sent the company to be executed "at once" and returned. The company made arrangements for supplying itself with necessary materials. The department notified the company to suspend action as the Postmaster General had not signed the contract, and it later entered into a contract with other parties after having declared an emergency to exist. The Court held that there was a contract binding on the Government and that the measure of damages was the difference between the contract price and the cost of performance. The Court said at page 317:

> "It will be observed from the recitation of the above facts that the case presents the propositions—First, was there a completed contract between the Envelope Company and the United States through its Postmaster General, and, Second, if there was such contract, what is the measure of damages?
>
> "For an affirmative answer to the first proposition the Envelope Company relies on *Garfielde* v. *United States*, 93 U. S. 242, and on that case the Court of Claims rested its

decision and considered that the case was supported by other cases which were cited.

"The case may be considered as the anticipation of this—its prototype. It passed upon a transaction of the Post Office Department and decided that a proposal in accordance with an advertisement by that department and the acceptance by it of the proposal 'created a contract of the same force and effect as if a formal contract had been written out and signed by the parties.' And for this, it was said, many authorities were cited but it was considered so sound as to make unnecessary review of or comment upon them.

"In resistance to the case as conclusive the Government urges the qualification that 'the court did not say, or assume to say, that the acceptance of the proposal in *all* (italics counsel's) cases constituted a contract, but held that it did in the present (that) case,' and that 'there was a reason for the conclusion * * * which does not obtain in the case at bar.' We cannot agree, and in answer to the first qualification it is only necessary to say that the court expressed a principle, not, of course, applicable to all cases, but applicable to like cases; and the present is a like case, identical in all that makes the principle applicable. And in so determining we answer the objection of the Government that there were features in the law in the *Garfielde Case* which do not obtain in the pending case, which constituted, if we understand counsel, the determination of the law against the act of the Postmaster General, his duty being merely ministerial. In the present case it is insisted his action is not so subordinate, that he has discretion, and when exercised it is paramount, his action being 'quasi judicial,' the contract not having been consummated, and that, there-

fore, it was within his power to review and set aside the decision of his predecessor. We are unable to concede the fact or the power asserted to be dependent upon it. There must be a point of time at which discretion is exhausted. The procedure for the advertising for bids for supplies or services to the Government would else be a mockery—a procedure, we may say, that is not permissive but required (Sec. 3709, Rev. Stats.). By it the Government is given the benefit of the competition of the market and each bidder is given the chance for a bargain. It is a provision, therefore, in the interest of both Government and bidder, necessarily giving rights to both and placing obligations on both. *And it is not out of place to say that the Government should be animated by a justice as anxious to consider the rights of the bidder as to insist upon its own. And, we repeat, there must be some point at which discretion ceases and obligation takes its place. That point is defined in the Garfielde Case*, and that the definition is applicable to the case at bar is illustrated by the findings of the Court of Claims. Upon the invitation, in accordance with law, of Postmaster General Gary, the Envelope Company and eleven others submitted bids. The Envelope Company was the lowest bidder and after the Company had been found upon investigation to be financially responsible its bid was accepted by entry of a formal order. The Company was then directed by the Department to execute the necessary contract in quadruplicate, which it did, and returned the contract to the Department with a surety whose responsibility was not questioned at any time nor was other security demanded, as it might have been. Postmaster General Gary went out of office, and his successor, either by inducement or upon his own reso-

> lution, revoked the contract and entered into a contract with other companies.
>
> "The record furnishes no justification of such action."

These two cases are but the concrete illustrations of the general rule of law, laid down by this Court in many cases, that where the United States by its duly authorized agent enters into contracts which are within the scope of the agent's authority, lawfully delegated by Congress, the United States is bound by the same rules of law as an individual would be bound by in like circumstances. This rule is stated by Chief Justice Waite in *United States* v. *Bostwick*, 94 U. S., 53, at page 66:

> "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them."

In *McKnight* v. *United States*, 98 U. S., 179, the Court said at page 186:

> "With a few exceptions growing out of considerations of public policy, the rules of law which apply to the Government and to individuals are the same. There is not one law for the former and another for the latter."

It follows from the authority of these cases that when the Secretary accepted Levinson's bid, awarded him the vessel, took his money and gave him a bill of sale, the United States thereupon became bound to deliver the vessel to him, title having already passed.

(e) Levinson's bid was in law and in fact the highest one received.

The Circuit Court of Appeals assumes that Johnson's bid was the highest bid. As a matter of fact and as a matter of law Levinson's bid was the highest bid, because Johnson's bid was not communicated to the Secretary in time to be effective as an offer. It is settled that a bid, before it can have any effect, must be communicated to the seller.

> *Anson on Contracts*, p. 29, American Ed.
> *Corpus Juris*, Vol. 13, p. 271, Sec. 65.
> *Cyc.*, Vol. 9, p. 252, "*Communication of Offer.*"
> *Ruling Case Law*, Vol. 6, Sec. 23, p. 601.

The advertisement of sale, in effect, required that bids must be received by the Bureau of Supplies and Accounts by 12 o'clock noon of August 20, 1919, when they would be publicly opened and the vessel sold. In other words, the bids in order to be considered must be opened and brought to the attention of the party conducting the sale before 12 o'clock noon, August 20th. This was not done in the case of Johnson's bid. It may be unfortunate for Johnson that some clerk in the Navy Department misplaced his bid, but the fact remains that his bid was not opened and communicated before noon on August 20, 1919. The fact that the bid miscarried after it arrived in Washington, and was in the hands of a clerk in the Navy Department, helps Johnson no more than if the miscarriage had occurred while the bid was in the custody of the Post Office Department, another Government agent. Until the bid was received and opened by

the person conducting the sale, it was an uncommunicated bid. Suppose that five years or ten years from now some industrious clerk finds a third bid for the *Wadena* which had, by mistake, got misplaced in the department, but which was a few dollars higher than that of either Levinson or Johnson. Can it be seriously contended that this bidder, if he is still willing to make good his bid would have the right to claim the vessel at that late day? The executive order and the advertisement contemplated action on communicated bids only. Such action was had and should not be disturbed.

POINT II.

The Government has no ground upon which to base a right of rescission of the bill of sale to Levinson.

As has been pointed out in an earlier part of this brief the suit is brought as a bill in the nature of a bill of interpleader by the United States as a stakeholder. Such a suit assumes that the stakeholder is neutral, and, of course, is inconsistent with any suggestion that the stakeholder desires the contract rescinded. If the suit had been for rescission Johnson would not be a proper party-defendant. Nevertheless, in its brief in the Circuit Court of Appeals, the Government urged that the award of the *Wadena* to Levinson was made through a mutual mistake of fact on behalf of the Secretary of the Navy and Levinson, which mistake ought to be corrected and a decree entered adjudging Johnson entitled to the possession of the

yacht upon the payment of the amount of his bid, and the Government further urged that "the attempted rescission by the Secretary of the Navy of the bill of sale to Levinson should have been upheld by the Court below (District Court), and the Court should have ordered said bill of sale rescinded and have permitted the acceptance of the bid of the appellant Johnson."

The defendant Johnson also urged in the Circuit Court of Appeals that a mistake was made in awarding the boat to Levinson, and that whether it was mutual or by mistake of one of the parties only, equity should relieve against it. The District Court considered the question and decided that there was no mutual mistake. The Circuit Court of Appeals did not discuss the point further than to disagree with the reasoning of the District Court to the effect that the Navy Department under the circumstances in this case was charged with notice of any bid which came to it in the regular course of mails, whether it opened it or not. The point has, we think, no proper place logically in the consideration of the case. There was no mistake. The Secretary intended to sell the *Wadena* to Levinson for $5,150 and Levinson intended to buy it; each side did exactly what it intended to do, and it is a manifest absurdity to speak of it as a mistake. Since, however, it was raised by both of the appellees in the Courts below, we will discuss the point as briefly as possible for the purpose of showing that, even if this were a suit in equity by the Government to set aside the bill of sale, it would fail for the reason that there would be no equity in the bill.

It may be remarked in passing that the argument of the District Attorney and the defendant Johnson presupposes that title has passed to Levinson, and that in order to divest that title the interposition of a court of equity is necessary. The admission of the passing of title is, of course, an admission of the principal point in the case, because if the Secretary of the Navy did not have authority to convey to Levinson title to the vessel, of course title would never have gone out of the United States and there would be no sale to rescind.

(a) Where a contract is executed it can be set aside only on the ground of actual fraud.

Where the contract is executed the rule is well settled that it can be set aside only on the ground of actual fraud. Levinson's contention is that the delivery of the bill of sale completed the contract of sale, and that it was from that moment an executed contract; that the delivery of the bill of sale passed the title to Levinson and that the Government's subsequent retention of and refusal to deliver the vessel was wrongful and illegal. In the case of *Seddon* v. *North Eastern Salt Company*, L. R. (1905) 1 Ch. Div., 326, an action was brought in the Chancery Division for *rescission of an executed contract of sale of shares*, brought about by a representation that the company had made a net trading loss not to exceed £200, or, at the outside, £250, up to a certain date. It later appeared that a loss of over £900 had been made, and that the company owed very considerable debts, in order to meet which later assessments of the amount remaining due upon the shares were required to be made. The Court, Joyce, *J.*, basing its decision upon the case of

Wilde v. *Gibson*, *infra*, and *Brownlie* v. *Campbell*, 5 App. Cas., 936, held, at page 332 (italics ours):

> "Then, as to the claim founded on alleged misrepresentation, it appears to me, as it has done all through, that the plaintiff's way to succeeding in his claim is beset with difficulties. Now, in the first place, *there is no allegation of fraud*, and, in point of fact, the imputation of fraud upon the defendants has been disclaimed and properly so. Well, then, *it is a claim to rescind or set aside for an innocent misrepresentation a contract for the sale of property, not executory, but executed, and under which nothing whatever still remains to be done.* * * * It appeared to me from the first, upon this case, that this fact—*the absence of fraud and the absence of any allegation of fraud—was a fatal objection to the action*, and I should be perfectly justified in disposing of it on those grounds alone, and saying no more about the facts of the case."

In *Wilde* v. *Gibson*, 1 H. C. L., 605, Lord Campbell states the rule upon which the *Seddon* case, *supra*, was determined (p. 632) (italics ours):

> "My Lords, after the very attentive and anxious consideration which this case has received, I have come to the clear conclusion that the decree appealed against ought to be reversed; and I must say that, in the Court below, the distinction between a bill for carrying into execution an executory contract, and a bill to set aside a conveyance that has been executed, has not been very distinctly borne in mind.
>
> With regard to the first: If there be, in any way whatever, misrepresentation or concealment, which is material to the purchaser, a court of equity will not compel him to com-

plete the purchase; *but where the conveyance has been executed, I apprehend, my Lords, that a court of equity will set aside the conveyance only on the ground of actual fraud.*"

There is, of course, no allegation or supposition of fraud in this case, and if the transaction be considered as an executed one, equity will not set the conveyance aside.

(b) If executory, the contract of sale cannot be rescinded.

If the contract be not regarded as an executed contract because of the non-delivery of the boat (a position which we regard as wholly untenable, since delivery of a bill of sale of a chattel passes title as completely as delivery of the chattel itself), it cannot be cancelled, because—

1. The mistake related to something extrinsic to the subject-matter, and
2. Was the result of the negligence of the Government.

1. Where the mistake relates to matters extrinsic to the subject-matter of a contract, whether it be a contract of sale or of any other nature, rescission may not be had in a court of equity, and this is particularly true where the mistake is a unilateral mistake. For example, belief in the financial condition of a person may be the motive and material fact of a business transaction, but it is not necessarily a part of it. This is established in the case of *Dambmann* v. *Schulting*, 75 N. Y., 55. There the defendant was in debt to the extent of $100,000, of which he owed $10,000 to the plaintiff. He was to pay

when able. He asked the plaintiff if he would accept $5,000 and give a general release. The plaintiff accepted, the $5,000 was paid and the release was given. The defendant was in fact able to pay more, but he made no representation as to his financial condition and the plaintiff asked no questions about it. In an action to set aside the release it was held that there was neither fraud nor mistake authorizing the interference of the Court. As to mistake, the Court, per Earl, *J.*, said (p. 63):

> "There was no mistake as to any fact intrinsic to the release. Plaintiff knew that the defendant had not been legally discharged from his liability, and that for the $5,000 he was to give him an absolute release; and he gave him just such a release as he intended to. There was no mistake of any intrinsic fact essential to the contract or involved therein. The defendant's financial condition was an extrinsic fact, which might have influenced the plaintiff's action if he had known it. But ignorance of or mistake as to such a fact is not ground for affirmative equitable relief."

This case was retried and the same result reached (85 N. Y., 622).

In *Whittemore* v. *Farrington*, 76 N. Y., 452, a purchaser of land who was entitled to a deed with covenants accepted a quitclaim deed, believing the land to be free and clear of encumbrance. An encumbrance *unknown to both parties* was afterwards discovered and he thereupon brought an action for rescission on the ground of mutual mistake. The Court dismissed the complaint, saying, at page 458, per Rapallo, *J.*:

> "There was no mistake as to the character of the deed which was tendered and accepted."

In *Southwick* v. *First National Bank of Memphis*, 84 N. Y., 420, the drawees of a draft *would not have cashed it had they known how the proceeds were to be applied.* Held, that such a mistake was not a ground for rescission. The Court, per Earl, *J.*, said, at page 433:

> "It is certainly true that if the drawees had known what they now know, or if they had known that the proceeds of the draft were to be applied otherwise than upon the old draft, they would not have accepted or paid the draft. But were they so mistaken that they can reclaim the money voluntarily paid by them? It is not every mistake that will lay the ground work for relief. It must be a mistake as to some existing fact, not as to something to happen or to be done in the future. It must be a mistake as to some fact not remotely, but directly, bearing upon the act against which relief is sought. (*Dambmann* v. *Schulting*, 75 N. Y. 55.) If it were the rule to relieve against mistakes as to remote or what are sometimes called extrinsic facts, great uncertainty and confusion would attend business transactions. Here the draft was genuine, addressed to the drawees, who had authorized it to be drawn, and it was held by the defendant, which could lawfully receive payment thereof. There was no mistake as to the intrinsic facts."

In *Steinmeyer* v. *Schroeppel*, 226 Ill., 9, the Court denied a motion to cancel a contract to supply building material on the ground of mistake. The Court said at page 14:

> "A mistake which will justify relief in equity must affect the substance of the contract, and not a mere incident or the induce-

> ment for entering into it. The mistake of the appellants did not relate to the subject matter of the contract, its location, identity or amount, and there was neither belief in the existence of a fact which did not exist or ignorance of any fact material to the contract which did exist. The contract was exactly what each party understood it to be, and it expressed what was intended by each. If it can be set aside on account of the error in adding up the amounts representing the selling price, it could be set aside for a mistake in computing the percentage of profits which appellants intended to make, or on account of a mistake in the cost of the lumber to them, or any other miscalculation on their part. If equity would relieve on account of such a mistake there would be no stability in contracts, and we think the Appellate Court was right in concluding that the mistake was not of such character as to entitle appellants to the relief prayed."

2. Where a mistake is the result of negligence a court of equity will not relieve the negligent party. In *Grimes* v. *Sanders*, 93 U. S., 55, the plaintiff sought the cancellation of a deed to land, because when he purchased the land he supposed that an abandoned shaft was on the premises purchased, whereas in fact it was on other land. There was evidence of negligence on the part of the complainant's agent in not ascertaining the true facts. In holding that the bill could not be maintained the Supreme Court said at page 61:

> "Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence 'which may

> be fairly expected from a reasonable person.' *Kerr on Fraud and Mistake*, 407."

On the same page (61) the Court cites the case of *Manser* v. *Davis*, 6 Ves., 678. In that case the complainant, being desirous to become a freeholder in Essex, bought a house which he supposed to be in that county. It proved to be in Kent. He was compelled in equity to complete the purchase. In commenting on this case, Mr. Justice Swayne says:

> "The mistake there, as here, was the result of want of proper diligence."

The case of *Moffett, Hodgkins & Clark Co.* v. *City of Rochester*, 178 U. S., 373, was relied upon strongly in the Court below by both the Government and the defendant Johnson. The facts in that case were that the complainant submitted a bid to the Executive Board of the City of Rochester. When its bid was opened and read the complainant's engineers at once announced that a mistake had been made in the prices set forth in the bid; nevertheless the City of Rochester endeavored to hold the complainant to its bid because of a provision in the city charter that no bidder should have "the right to withdraw or cancel the same (bid) until the Board shall have let the contract for which such bid is made, and the same shall be duly executed." The bill in the Circuit Court asked for a reformation of the bid so as to conform it to the complainant's intention in making it, or for a rescission of the contract, if it had reached the stage of a contract. The Court held that it could not reform the bid since there was no mutual mistake, but decreed that the proposals be "rescinded, cancelled and declared null, void and of no effect."

This decree was reversed in the Circuit Court of Appeals, and on appeal to this Court the decree of the Circuit Court of Appeals was reversed and that of the Circuit Court affirmed. The case is not in point for the reason that the ground of the decision of this Court was that the bid was withdrawn before it was accepted, and therefore there never was a binding contract between the parties. This is clear from the statement of this Court on page 386 of the report:

> "The transactions had not reached the degree of a contract—a proposal and an acceptance."

There is a further distinction, namely, that in the *Moffett* case, if there was a mistake, it was with reference to intrinsic facts, in consequence of which the minds of the parties never met; in the case at bar, if there was any mistake, it was one extrinsic, and with reference to an outside matter, namely, the bid of a third party. At the time Levinson's bid was accepted, Levinson intended to buy, and the Secretary intended to sell, at the agreed price of $5,150. Both parties did exactly what they intended to do, namely, sell the *Wadena* for $5,150. The fact that the Secretary probably would not have sold the vessel for $5,150 if he had known that Johnson had attempted to bid $6,500 for it presents no ground, under any principle of law which we have been able to discover, for the equitable relief of rescission.

POINT III.

The Government's refusal to deliver the *Wadena* to Levinson was wrongful, and the decree of the Circuit Court of Appeals should be reversed, the decree of the District Court affirmed, and the Government directed to deliver the vessel to Levinson.

Respectfully submitted,

JOHN A. McMANUS,
Counsel for Defendant-Appellant.

DUNCAN & MOUNT,
Solicitors.

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Supreme Court of the United States,

OCTOBER TERM, 1921.

No. 145.

MORRIS LEVINSON,
Defendant-Appellant,

vs.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

S. HARRY JOHNSON,
Defendant-Appellee.

AFFIDAVIT AND NOTICE OF MOTION TO BE FILED AS A SUPPLEMENT TO THE BRIEF OF THE DEFENDANT-APPELLEE, S. HARRY JOHNSON.

HENRY AMERMAN,
Solicitor for Defendant-Appellee
Johnson.

Notice of Motion.

SUPREME COURT OF THE UNITED STATES

October Term 1921.

No. 145.

MORRIS LEVINSON,
Defendant Appellant,

vs.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

S. HARRY JOHNSON,
Defendant-Appellee.

Sirs:

PLEASE TAKE NOTICE that upon the affidavit of S. HARRY JOHNSON, verified the 28th day of February, 1922, and on all the papers and proceedings had herein, the undersigned will respectfully move this court, at a term thereof, to be held at the court room of this court, at the Capitol, Washington, D. C., on the 2nd day of March, 1922, at ten o'clock in the forenoon of said day, or when the appeal in the above entitled action is reached for argument, for an order dismissing the appeal herein, on the ground that the questions involved have become academic and if the appellant should succeed and the relief demanded be granted, the decree of the Circuit Court of Appeals reversed.

and the decree of the District Court affirmed, and the Government directed to deliver the Wadena to the appellant, such a decree could not be enforced, for the reason that the Government is not in possession of the boat; and for such other and further relief as may be just and equitable in the premises.

Dated, February 28, 1922.

Yours &c.,

5 HENRY AMERMAN,
Solicitor for Defendant-Appellee S. Harry Johnson,
Office and Post Office Address:
233 Broadway,
Borough of Manhattan,
New York City.

To:

JAMES M. BECK, Esq.,
Solicitor General of the United States,
Washington, D. C.

DUNCAN & MOUNT, Esqs.,
6 Solicitors for Defendant-Appellant Morris Levinson,
27 William Street,
Borough of Manhattan,
New York City.

Affidavit. 7

SUPREME COURT OF THE UNITED STATES,

October Term 1921.

No. 145.

MORRIS LEVINSON,
Defendant-Appellant,

vs.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee, 8

and

S. HARRY JOHNSON,
Defendant-Appellee.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, ss.:

S. HARRY JOHNSON being duly sworn, deposes and says:

That he is one of the defendants and appellees in the above entitled action.

That on or about the 24th day of June, 1920, 9 a decree was entered by the United States District Court, in pursuance of a mandate of the United States Circuit Court of Appeals, for the Second Circuit, in which it was

> "ORDERED, ADJUDGED AND DECREED that the defendant S. Harry Johnson is entitled to the possession of the steam yacht Wadena, and the United States of America is hereby di-

rected, immediately after receiving payment of the sum of Sixty-five hundred dollars ($6500), the amount of the bid of said S. Harry Johnson, to deliver to the said S. Harry Johnson the said steam yacht Wadena."

That immediately thereafter your deponent paid the full amount of his bid for the S.S. Wadena and on or about July 12th, 1920, your dependent received a Bill of Sale from the Secretary of the Navy, a copy of which is hereto annexed and made a part hereof, and marked Exhibit "A."

11 That on or about the said 12th day of July, 1920, your deponent received an order from the Secretary of the Navy, directing the custodian of said steam yacht Wadena to deliver said boat to your deponent, and your deponent thereupon took delivery of said boat.

Deponent further says that after the decision of the Circuit Court of Appeals reversing the decree of the District Court and directing the delivery of the Wadena to your deponent, to avoid further litigation the appellant Levinson and your deponent had an interview, together with their respective attorneys, and an agreement was en-

12 tered into by which the appellant Levinson, who is engaged in the business of buying and selling boats of various kinds, was authorized to procure a purchaser for the Wadena, and that the proceeds of said sale were to be used, first, to reimburse your deponent for the purchase price of the boat; second, pay commissions, and the balance of the proceeds were to be divided equally between the appellant Levinson and your deponent. That the

appellant Levinson was unable to secure a purchaser at that time and the contemplated arrangement was abandoned, and the appellant thereafter served his notice of appeal to this court.

Deponent is informed by his counsel, and verily believes, that the appellant did not file a supersedeas bond staying all proceedings pending the hearing and determination of this appeal, but only filed the usual bond for costs.

Deponent further says that when he obtained possession of the Wadena, it became necessary to put the boat in condition for operation, and that the cost thereof was about $3,500.

That on or about January 3rd, 1921, your deponent sold and delivered the S.S. Wadena, together with all of the furnishings and equipment then on the vessel, to the Aeromarine Plane & Motor Company, a New York corporation, and said boat was thereafter registered in the Custom House at New York in the name of said purchaser.

That thereafter and on or about the 11th day of January, 1921, the said Aeromarine Plane & Motor Company sold, transferred and delivered the said S.S. Wadena to the Aeromarine Engineering & Sales Co., Inc., a New York corporation, as deponent is informed by John W. German, Vice-President of said Aeromarine Plane & Motor Company.

Deponent further says that he is informed by the said John W. German that the said S.S. Wadena was duly registered at the Custom House, New York, by the said Aeromarine Engineering & Sales Company, Inc., and that said Company is now the owner of said vessel.

16 *Affidavit.*

Deponent further says, that from conversations had with the appellant Morris Levinson and his counsel in this case, he learned that the said Levinson, after receiving a bill of sale from the Secretary of the Navy, on or about the third of September, 1919, made no contract for the sale of the Wadena, or any arrangements for the use of said boat or agreement relating thereto, and that when the Navy Department refused to deliver the boat to said Levinson, he had not changed his position or suffered any damage. That after the
17 litigation in connection with said yacht in the United States District Court and the United States Circuit Court of Appeals, your deponent duly obtained possession of said boat, as hereinbefore set forth.

That your deponent has expended the moneys herein stated to put the boat in condition to operate and retained title and possession of said boat for a period of about six months. That the boat had suffered greatly because of lack of care and attention, and in order to use the boat at all, moneys had to be expended to put the vessel in condition for use. That by reason of the facts herein set forth your deponent's position has
18 materially changed since the filing of his bid, the payment of the purchase price of the Wadena, and the acceptance of delivery of said vessel.

Deponent is informed by his counsel, and verily believes, that the appellant is demanding upon this appeal that the decree of the Circuit Court of Appeals be reversed, and the decree of the District Court affirmed, and the Government directed

to deliver the S.S. Wadena to the appellant Levinson. That if the demand of the appellant is complied with and this court reverses the court below and affirms the decree of the District Court directing the delivery of the Wadena to the appellant Levinson by the Government, this order the Government could not comply with, as it no longer has possession of or control over said boat. That if the Government did make a binding contract with Morris Levinson and refused to comply with the terms of said contract, then and in that event the said Levinson has a remedy at law, and the questions to be determined upon this appeal, if decided in favor of the appellant, would furnish him no relief whatever.

It accordingly appears as though this appeal raises nothing but a moot question, and should accordingly be dismissed.

No previous application for the dismissal of the appeal herein has been made to this court.

S. HARRY JOHNSON.

Sworn to before me this 28th day of February, 1922.

MAE GROSS,
Notary Public,
Bronx Co. Clk's No. 38, Reg. No. 30,
New York Co. Clk's No. 221, Reg. No. 3214,
Kings Co. Clk's No. 22, Reg. No. 3105.
Commission expires March 30, 1923.

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Exhibit A.

UNITED STATES OF AMERICA,
NAVY DEPARTMENT.

Washington, D. C., July 12, 1920.

This certifies that, under authority given to the Secretary of the Navy by the fifth section of the act of Congress approved March 3, 1883 (Chap. 111, Statutes at Large, Vol. 22, page 600), and after a full compliance with all the conditions thereof, Mr. S. H. Johnson having become the legal purchasers of the U. S. S. WAOENA, S. P. 158,
23 sold under the advertisement of the Navy Department of 20 August 1919 and having paid the United States the sum of Six Thousand Five Hundred dollars ($6,500.00) therefor, the receipt of which is acknowledged, said vessel is hereby delivered to and declared to be the property of said Mr. S. H. Johnson.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Navy Department to be affixed at the City of Washington this 12th day of July in the year of our Lord one thousand nine hundred and
24 twenty.

[SEAL OF NAVY DEPARTMENT]

R. E. COONTZ,
Acting Secretary.

CITY OF WASHINGTON, }
DISTRICT OF COLUMBIA. } ss.: 25

BE IT KNOWN that on this 12th day of July 1920 personally appeared before me R. E. COONTZ, Acting Secretary of the Navy, and acknowledged the within instrument to be his free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal this 12th day of July A. D. 1920.

MARIE ROLAND,
[SEAL] Notary Public.

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BRIEF FOR THE UNITED STATES

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

MORRIS LEVINSON, APPELLANT,
v.
UNITED STATES OF AMERICA AND S. HARRY JOHNSON. } No. 145.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES AS AMICUS CURIÆ.

The appeal is from an order of the Circuit Court of Appeals (Tr. 26, 27), which adjudged that S. Harry Johnson was entitled to the steam yacht *Wadena* and that the Secretary of the Navy should deliver it to him (Tr. 22, 24).

The undisputed facts are that Johnson bid $6,500 and Morris Levinson bid $5,150 for the yacht *Wadena* in response to an advertisement for bids by the Secretary of the Navy with which both bidders complied. On opening the bids on the appointed day the highest bid found was by Levinson and the yacht was awarded to him. He forwarded his certified checks for the amount and received a bill of sale for the yacht. Three weeks later and before

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physical delivery was made of the yacht to him, bids were opened for the vessel *Wandena*, wherein was found the bid of Johnson for the *Wadena*. Whereupon the Navy Department stopped delivery of the *Wadena*, and returned to Levinson his purchase price checks with request that he surrender his bill of sale, which he refused to do. He sent the two checks back to the department.

The United States attorney filed in the United States District Court for the Southern District of New York a bill in the nature of a bill of interpleader in the name of the United States against Levinson and Johnson as defendants, praying the court to adjudge and decree who was entitled to the *Wadena*. The bill is brief, and inasmuch as each defendent admitted "each and every allegation" the facts need not be restated.

After hearing and an oral opinion (Tr. 9), Judge Learned Hand decreed that Levinson was entitled to the possession of the *Wadena* and that the stakeholder, the United States, should deliver the yacht to him immediately after receiving payment of the amount of his bid (Tr. 13). Johnson and the United States took separate appeals to the Circuit Court of Appeals (Tr. 14, 18).

After hearing and opinion (Tr. 22), the Circuit Court of Appeals (Circuit Judges Ward and Manton concurring and Circuit Judge Hough dissenting) held, June 9, 1920, "that the United States, being a mere stakeholder, has no standing to take an appeal and its appeal is dismissed, but that the Secretary, having

no authority to deliver the bill of sale to Levinson and being bound to deliver it to Johnson as the highest bidder, the decree must be reversed" (Tr. 24). On June 22, 1920, the Circuit Court of Appeals filed its final decree and order for mandate accordingly (Tr. 25).

On September 10, 1920, Levinson filed his petition for appeal to this Court from the decree of the Circuit Court of Appeals, and on September 16, 1920, Circuit Judge Ward signed the order allowing the appeal, which also directed that Levinson give a cost bond of $250.

ARGUMENT.

I.

If the Navy Department has made delivery of the yacht to Johnson, the case has become moot.

According to an affidavit just filed by the appellee Johnson, on June 24, 1920, two days after the decree of the Court of Appeals was filed, the United States District Court entered its decree on the mandate, wherein it was—

> ORDERED, ADJUDGED, AND DECREED, That the defendant, S. Harry Johnson, is entitled to the possession of the steam yacht *Wadena*, and the United States of America is hereby directed, immediately after receiving payment of the sum of sixty-five hundred dollars ($6,500), the amount of the bid of said S. Harry Johnson, to deliver to the said S. Harry Johnson the said steam yacht *Wadena*.

The affidavit further shows that on July 12, 1920, 18 days after the decree was entered in the District Court on the mandate of the Court of Appeals, 29 days before the petition for appeal was filed, and 35 days before the appeal was allowed, the Acting Secretary of the Navy signed, sealed, and acknowledged a certificate that—

> Mr. S. H. Johnson having become the legal purchaser of the U. S. S. *Wadena* S. P. 158, sold under the advertisements of the Navy Department of 20 August, 1919, and having paid the United States the sum of six thousand five hundred dollars ($6,500.00) therefor, the receipt of which is acknowledged, said vessel is hereby delivered to and declared to be the property of said Mr. S. H. Johnson.

The affidavit further shows that Johnson took delivery of the yacht, and after expending about $3,500 thereon sold it, on or about January 3, 1921, to the Aeromarine Plane & Motor Company, which registered the boat in its own name. Subsequently, on or about January 11, 1921, that company resold the yacht to the Aero Engineering & Sales Company, which registered the yacht in its name.

The affidavit further shows that subsequent to the filing of the opinion of the Court of Appeals negotiations were conducted between Levinson and Johnson to the end that Levinson might secure a purchaser for the *Wadena* and that certain divisions in which Levinson was to share were to be made of the proceeds of sale.

The United States was designated in the opinions of the two lower courts as the *stakeholder*. It delivered the yacht to Johnson in pursuance of the decree of the District Court entered on the mandate of the Circuit Court of Appeals. Johnson took possession of the yacht and sold it.

There was no injunction, supersedeas, bond, or other mandate or obligation whatever outstanding and effective which in any way tended to stay the action of the Secretary of the Navy in delivering the yacht to Johnson. The transaction was closed absolutely on the decree of the District Court entered in pursuance of the mandate before Levinson filed his petition for appeal. He does not appear to have applied for a suspension of the decree or taken any other steps to prevent disposition of the yacht. It will hardly be claimed that the filing of his petition for appeal to this court from the decree of the Court of Appeals operated, *nunc pro tunc*, in the nature of a notice that he would take further steps to have determined his alleged rights in personal property which had already been disposed of by the United States.

It is obvious that any opinion or decree which this court may now announce would be merely advisory, as the Secretary of the Navy has no steam yacht *Wadena* to deliver.

In *Cheong Ah Moy* v. *United States* (113 U. S. 216, 217, 218) the Circuit Court ordered that a Chinese woman be returned on board the vessel in which she came, or some other vessel of the same line, to

be carried back to China. Having failed to place her on board the vessel, the marshal placed her in jail for safe-keeping until another vessel should be on hand. Her counsel applied to the Circuit Court for permission to give bail and have her released but the Circuit Court overruled the application, and, being divided in opinion, certified the division to this court. Three days after the order was made overruling the motion, and 10 days before writ of error was served by filing it in the office of the clerk of the Circuit Court, the marshal placed the prisoner aboard the steamship about to start for China. In delivering the opinion, Mr. Justice Miller said:

> It thus appears that the order of deportation had been fully executed, and the petitioner in the writ of habeas corpus placed, without the jurisdiction of the court, and of the United States, six days before the writ of error was filed in the Circuit Court, and several days before it was issued.
>
> The question, therefore, which we are asked to decide is a moot question as to plaintiff in error, and if she was permitted to give bail, it could be of no value to her, as the order by which she was remanded has been executed, and she is no longer in the custody of the marshal in the prison.
>
> This court does not sit here to decide questions arising in cases which no longer exist in regard to rights which it can not enforce.

See also *California* v. *San Pablo, &c., Railroad Co* (149 U. S. 308, 314).

In *Mills* v. *Green* (159 U. S. 651, 653) this court, speaking through Mr. Justice Gray, said:

> The defendant moved to dismiss the appeal, assigning, as one ground of his motion, "that there is no actual controversy involving real and substantial rights between the parties to the record, and no subject matter upon which the judgment of this court can operate."
>
> We are of opinion that the appeal must be dismissed upon this ground, without considering any other question appearing on the record or discussed by counsel.
>
> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which can not affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. (*Lord* v. *Veazie*, 8 How. 251; *California* v. *San Pablo & Tulare Railroad*, 149 U. S. 308.)

In *American Book Co.* v. *Kansas* (193 U. S. 49, 52) this court, after quoting from *Mills* v. *Green* (109

U. S. 651), and speaking through Mr. Justice McKenna, said:

> The case at bar is certainly within the principle. The judgment has been complied with. It makes no difference that plaintiff in error "felt coerced" into compliance. A judgment usually has a coercive effect, and necessarily presents to the party against whom it is rendered the consideration whether it is better to comply or continue the litigation. After compliance there is nothing to litigate.
>
> It is further urged that another suit has been brought and, as decisive of its issues or some of its issues, the judgment in the case at bar is pleaded. But that suit is not before us. We have not now jurisdiction of it or its issues. Our power only extends over and is limited by the conditions of the case now before us.

In *Jones* v. *Montague* (194 U. S. 147, 153) this court, speaking through Mr. Justice Brewer, again citing *Mills* v. *Green*, *supra*, said:

> But—as shown by the affidavit, and as indeed we might perhaps take judicial notice by the presence in the House of Representatives of the individuals elected at that election from the various congressional districts of Virginia—the thing sought to be prohibited has been done and can not be undone by any order of court. The canvass has been made, certificates of election have been issued, the House of Representatives (which is the sole judge of the qualifications of its Members) has admitted the parties holding the certificates

> to seats in that body, and any adjudication which this court might make would be only an ineffectual decision of the question whether or not these petitioners were wronged by what has been fully accomplished. Under those circumstances there is nothing but a moot case remaining, and the motion to dismiss must be sustained.

In *Wilson* v. *Shaw, Secretary, etc.* (204 U. S. 24, 30), this court, speaking through Mr. Justice Brewer, again citing *Mills* v. *Green, supra*, said:

> If the bill was only to restrain the Secretary of the Treasury from paying the specific sums named therein, to wit, $40,000,000, to the Panama Canal Company, and $10,000,000 to the Republic of Panama, it would be sufficient to note the fact, of which we may take judicial notice, that those payments have been made and that whether they were rightfully made or not is, so far as this suit is concerned, a moot question. (*Cheong Ah Moy* v. *United States*, 113 U. S. 216; *Mills* v. *Green*, 159 U. S. 651; *American Book Company* v. *Kansas*, 193 U. S. 49; *Jones* v. *Montague*, 194 U. S. 147.)

II.

The decree of the District Court entered on the mandate decreed the yacht to Johnson and that decree is not under review here.

The conclusion of appellant's brief urges "that the decree of the Court of Appeals should be reversed" and "the decree of the District Court affirmed."

Of course the learned counsel means the decree by Judge Learned Hand, entered February 4, 1920, should be affirmed. But what becomes of the decree entered June 24, 1920, referred to in the affidavit of Johnson and in pursuance of which the parties acted and presumably of which appellant and his counsel have all the time had notice? The latter decree was entered nearly two years ago and no appeal was ever taken therefrom.

Even if this Court should hear the present appeal, reverse the judgment of the Court of Appeals, and affirm the decree of Judge Learned Hand, how would that affect the decree entered on the mandate from which appellant asks no relief and about which he says nothing? The relief which appellant asks would not vacate the uncontested decree entered on the mandate of the Court of Appeals. There is no line running between this Court and the District Court which will reach the decree entered June 24, 1920, on the mandate of the Court of Appeals.

CONCLUSION.

There is no case or controversy pending before this Court upon which its mandate or decree may now operate and it is respectfully submitted that the appeal should be dismissed.

JAMES M. BECK,
Solicitor General.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

MARCH 1, 1922.

No. 567

Supreme Court of the United States

OCTOBER TERM 1920.

MORRIS LEVINSON,

Petitioner,

against

UNITED STATES OF AMERICA AND S. HARRY JOHNSON,

Respondents.

Petition and Brief for Writ of Certiorari

RUSSELL T. MOUNT,
Counsel for Petitioner.

Supreme Court of the United States.

MORRIS LEVINSON, Petitioner, against UNITED STATES OF AMERICA and S. HARRY JOHNSON, Respondents.	October Term 1920. No.

SIRS:

PLEASE TAKE NOTICE that the annexed petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit in the above entitled matter, will be presented to the Supreme Court of the United States at the opening of court on October 4, 1920, or as soon thereafter as counsel can be heard.

Yours, etc.,

RUSSELL T. MOUNT,
Counsel for the Petitioner.

To:

HENRY AMERMAN, ESQ.,
Solicitor for S. Harry Johnson,

FRANCIS G. CAFFEY, ESQ.,
United States Attorney.

SUPREME COURT OF THE UNITED STATES.

MORRIS LEVINSON, Petitioner, against UNITED STATES OF AMERICA and S. HARRY JOHNSON, Respondents.	October Term 1920, No.

PETITION OF MORRIS LEVINSON FOR A WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Morris Levinson respectfully shows to this Court as follows:

1. This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a final but not unanimous decision of that Court which reversed the decree of the United States District Court for the Southern District of New York.

2. On January 8, 1920 the United States of America filed a bill in equity in the nature of a bill of interpleader in the U. S. District Court for the Southern District of New York against petitioner and one S. Harry Johnson and prayed the District Court to determine to whom the

United States should deliver a certain yacht called the WADENA.

The facts of the case were fully set forth in the bill of interpleader to which both reespondents filed answers admitting the facts set forth in the Government's bill. These facts were briefly as follows:

The Secretary of the Navy by a written offer of sale dated July 11, 1919, offered certain yachts and motor boats including the yacht WADENA for sale. The petitioner, Morris Levinson, submitted a bid in writing for the WADENA, which bid was accepted by the Seecretary of the Navy, who upon receiving the amount of the petitioner's bid gave to petitioner a bill of sale for the WADENA. After the delivery of the bill of sale, but before the actual delivery of the vessel, it was discovered by some one in the Navy Department that S. Harry Johnson had submitted a higher bid for the WADENA but that his bid had been misplaced in the files of the Navy Department and filed with certain bids received for another yacht called the WANDENA. Upon learning of Johnson's bid the Navy Department returned the petitioner's checks, demanded the return of the bill of sale of the WADENA and stopped delivery of the boat. Levinson refused to take back the checks, declined to give up the bill of sale and insisted that the vessel be delivered to him. This was refused and the present bill of interpleader was brought by the United States in order to have the District Court determine to which one of the bidders the Government should deliver the vessel.

The WADENA was advertised and sold under the authority of the Act of March 3, 1883, as

modified by Executive Order No. 3021, dated January 7, 1919. The executive order provided that "The Secretary of the Navy shall advertise and sell at public sale any and all of said vessels which are in his opinion not necessary for the needs of the Navy at such price as he shall approve."

Judge Learned Hand in the District Court decided in favor of Levinson and directed the United States to deliver the WADENA to Levinson. The other bidder, Johnson, and also the United States of America appealed to the Circuit Court of Appeals for the Second Circuit from the order entered upon the decision of Judge Hand. The Circuit Court of Appeals, Judge Hough dissenting, reversed the decision of Judge Hand, dismissed the appeal by the Government and directed that the vessel be delivered to S. Harry Johnson.

An appeal from the decision of the Circuit Court of Appeals has been taken by your petitioner to this Court; and this petition is presented out of an abundance of precaution so that should any question be raised as to the right of the petitioner to appeal to this Court the matter may nevertheless be brought before this Court and a decision had from this Court.

3. The general importance of this case lies in the fact that at the present time, and probably for a long time to come, the United States will be continually making sales of various kinds of personal property and it is generally felt that an authoritative and elucidative opinion by this Court is needed to make clear the relation of the Government to its agents, particularly when these

agents make contracts with private parties and the binding force of such contracts. It is also important to have an authoritative statement by this Court as to what acts of the Government constitute commercial transactions for which the Government is liable as an ordinary citizen and what acts involve a Governmental function where the rule of Governmental liability differs from the rule applicable to private parties.

The lack of uniformity among the four Judges below who have considered this case shows that the rules of law governing a situation such as is involved in the present case are not clear. The Circuit Court of Appeals says in its decision in this case (Record, p. 45) that the subject has not been frequently considered. However, the trend of modern opinion as illustrated in recent legislation is in favor of holding the Government to a strict accountability in its dealings with private citizens, both in matters of contract and in tort. It is important, therefore, that the decision of the majority of the Circuit Court of Appeals in this case which seems opposed to the more modern view-point should not remain unconsidered by this Court.

4. The Circuit Court of Appeals holds that the Government in disposing of this yacht was exercising a Governmental function. (Record p. 45). It is submitted, however, that the sale, although conducted by the Navy Department, was a purely commercial transaction in that it was purely and simply a sale for such price as it could get of property no longer needed by the Navy Department. In such cases this Court has held that the Government is to be regarded *pro*

hac vice as a private individual contracting and is bound accordingly. *United States* v. *Bostwick*, 94 U. S. 53, where this court said at page 66: "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances would be implied against them." *Hall* v. *State of Wisconsin* (1880) 103 U. S. 5; *Cooke* v. *United States* (1875) 91 U. S. 389; *Salas* v. *United States* (1916, C. C. A. 2 c.) 234 Fed. 842.

5. The Circuit Court of Appeals further holds that the Secretary of the Navy had no authority under the notice of sale to accept anything but the highest bid (Record p. 45) and that in delivering the bill of sale to Levinson the Secretary acted without authority to bind the Government. It is respectfully submitted that the obvious answer to this position is that the Secretary's authority could not be limited or prescribed by his own advertisement for bids.

The power of the Secretary was created and limited only by the statute and executive order. Under these he had the power to sell the WADENA "at such price as he shall approve". He did approve the bid of Levinson or he would not have delivered to him a bill of sale . Title to the yacht passed to Levinson upon the acceptance of his bid and delivery of the bill of sale and he is entitled to the possession of the yacht.

6. Upon the delivery of the bill of sale to Levinson, the transaction was a completed one and if any mistake had been made in the Navy

Department in filing Johnson's bid in the wrong file, it was not a mistake against which a Court of Equity would relieve. *Grimes* v. *Sanders*, (1876) 93 U. S. 55.

7. A certified copy of the transcript of the record including all proceedings in the Circuit Court of Appeals is filed herewith.

WHEREFORE, the petitioner prays that a writ of certiorari may be issued requiring the Circuit Court of Appeals for the Second Circuit to certify the record in the above case to this Court and that this Court will review the said decision of the Circuit Court of Appeals and reverse said decree of the Circuit Court of Appeals and restore the decree of the District Court to the end that the petitioner may be declared to be the party entitled to own and possess the said yacht WADENA, and that petitioner will ever pray, etc.

MORRIS LEVINSON,
Petitioner.

RUSSELL T. MOUNT,
Counsel for Petitioner.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

MORRIS LEVINSON, being duly sworn, deposes and says:

That he is the petitioner herein; that the foregoing petition is true to the best of his knowl-

edge, information and belief. He further says that this application is made in good faith and not for the purpose of delay.

MORRIS LEVINSON.

Sworn to before me this
17th day of September, 1920.

JAMES McLEAVY,
Notary Public,
New York Co. Clerk's No. 122
New York Co. Reg. No. 2107,
Kings Co. Clerk's No. 50,
Kings Co. Reg. No. 2018.

I hereby certify that I have examined the foregoing petition and that in my opinion it is meritorious and entitled to the favorable consideration of this Court.

RUSSELL T. MOUNT.

Service of the foregoing petition and brief is hereby admitted this 18th day of September, 1920.

HENRY AMERMAN,
Solicitor for S. Harry Johnson.

FRANCIS G. CAFFEY,
United States Attorney.

Supreme Court of the United States.

MORRIS LEVINSON, Petitioner, *against* UNITED STATES OF AMERICA and S. HARRY JOHNSON, Respondents.	October Term, 1920. No. 545 ~~537~~

MEMORANDUM ON BEHALF OF RESPONDENT S. HARRY JOHNSON, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of Facts.

On the 11th day of July, 1919, the Secretary of the Navy, under and by virtue of the Acts of Congress, approved August 5th, 1882, and March 3rd, 1883, as modified by Executive Order dated January 7, 1919, offered for sale by a written offer of sale on that day, certain vessels, in which it was provided that bids for the said vessels would be received until August 20th, 1919, at which time and at the hour therein named the bids would be publicly opened, and that the vessels would be sold for cash to the highest bidders.

The Executive Order provided that the Secretary of the Navy should have all vessels, boats and auxiliary ships of the Navy classified as yachts, etc., appraised by a board of officers designated for this duty, and said vessels were then to be sold to the former owners thereof at said appraised value, provided the former owners desired to purchase same. If said former owners were not desirous of purchasing said vessels for the amount of said appraisal, then the Secretary should advertise and sell at public sale any and all such vessels as, in his opinion, were not necessary for the needs of the Navy, for such price as he should approve. Among the vessels offered for sale on July 11th, 1919, was the "Wadena."

Said offer of sale also provided that each bid must be accompanied by either cash deposit, satisfactory certified check or other security therein named, in a sum equal to not less than one-tenth of the amount of the bid.

Said offer of sale also provided that in case full payment of an accepted bid was not made within thirty days of its acceptance, the security given should be considered as forfeited to the Government; and the Department further reserved the right to withdraw the vessels from sale at any time prior to acceptance of proposals and to reject any or all bids.

The petitioner Levinson, and the respondent Johnson, in conformity with said offer of sale, each submitted a bid for the said vessel "Wadena" before the day specified that bids would be publicly opened, the former one for the sum of $5,150, and the latter for the sum of $6,500, and both fully complied with all the conditions of the said offer of sale. The bid of the petitioner Le-

vinson was duly placed with other bids for the said "Wadena," but through inadvertence and mistake, and by reason of the similarity of the names "Wadena" and "Wandena," the bid of the respondent Johnson was placed with bids for the vessel "Wandena," which last named vessel was subsequently offered for sale by the said Secretary and the bids therefor opened eighteen days later than those for the "Wadena," viz., on September 8th, 1919.

On August 20th, 1919, the bids for the "Wadena" were opened and the bid of the petitioner Levinson for $5,150 was the highest found in the receptacle used for receiving bids for said vessel (the bid of the respondent Johnson having been deposited with those of the "Wandena" by mistake), and the Secretary of the Navy, assuming that Levinson's bid was the highest, thereupon notified him to that effect. A check for the balance of the bid of the petitioner Levinson, amounting to $4,635, was then forwarded by him to the Navy Department, and on September 3rd, 1919, a bill of sale for the "Wadena" was duly given to Levinson.

On September 8th, 1919, bids for the "Wandena" were opened, and among such bids was found the bid of the respondent Johnson for $6,500 for the "Wadena." Upon discovery of the said bid of Johnson among those for the "Wandena," the Navy Department immediately stopped delivery of the "Wadena" to the petitioner Levinson, and returned to him the checks which he had given in payment of his bid for said vessel and requested that he return the bill of sale for the "Wadena" sent to him. This Levinson declined to do, and he thereupon returned the

two checks to the Nevy Department and demanded delivery of the "Wadena," claiming that title to said vessel had passed to him.

The cause came on for a hearing before Hon. Learned Hand, United States District Judge, on January 31st, 1920, on the pleadings, no oral evidence having been adduced by any of the parties to the action, and on the 4th day of February, 1920, the said Judge, by an order dated on that day, ordered, adjudged and decreed that the petitioner Levinson was entitled to the possession of the "Wadena," and the United States of America was directed immediately after receiving payment of the sum of $5,150, the amount of the bid of said Levinson, to deliver the said "Wadena" to him.

Both the Government and the respondent Johnson appealed from this decree to the United States Circuit Court of Appeals, for the Second Circuit, which appellate court reversed the decree of the District Court and directed that the S. S. "Wadena" be delivered to the respondent Johnson.

The full amount of Johnson's bid was paid, a bill of sale given, and the vessel delivered to him.

Reply to Petitioner's Brief.

The petitioner expresses the opinion that, inasmuch as the Government at this time—and probably for some time to come—will be making sales of all kinds of personal property, therefore an authoritative and elucidative opinion of this Court is necessary to make clear the relation of the Government to its agents, particularly when these agents make contracts with private parties

and the binding force of such contracts; also that it is important to have an authoritative statement by this Court as to what acts of the Government constitute commercial transactions for which the Government is liable as an ordinary citizen; and what acts involve a Governmental function where the rule of governmental liability differs from the rule applicable to private parties.

The Government has had a number of wars during the period of its existence, and for a long time has been accustomed to sell articles of personal property for which it had no further use, so that there are no new conditions with respect to this subject confronting us at the present time. Government agents act under statutes or orders which have the effect of statutes, and they are bound to follow the provisions therein set forth and are not free to act otherwise.

The petitioner's suggestion that it is imperative for this Court to pass upon a proposition of this kind seems less important than many other questions. The courts interpret the laws, and can hardly be expected to define the relationship between the Government and its agents, except to determine whether any particular act of an agent was within or beyond his authority under the statute authorizing the agent to act. Of all the large number of transactions between the Government and private parties dealing with it, comparatively few of them have had to be reviewed by the courts. The principle underlying the acts of Government agents is clear and well settled and it needs no further decision to determine the agent's status.

Steele *v.* United States, 113 U. S., 128;
United States *v.* Stockgrowers Bank, 30 Fed. Rep., 912;
The Floyd Acceptances, 7 Wall., 666.

The binding force of a contract between the Government and a private citizen has been passed upon over and over again and is clear and free from doubt.

Cooke *v.* U. S., 91 U. S., 389;
U. S. *v.* Walsh, 115 Fed. Rep., 697.

The decision in the case of *Steele* v. *United States* (*supra*) is a very clear determination of the law relating to sales of government property and should govern in this case.

When a party deals with a corporation, he must transact the business through officers or agents of the corporation; and a person making a contract with a corporation is bound to know that the officers or agents thereof are acting within the scope of their authority, and if they so act, the corporation is bound. This is equally true where an individual has a transaction with the Government. A sovereign power acts through its agents and everyone dealing with it is bound to know at his peril that the agent is acting within the scope of his authority. A private individual in dealing with the Government has a greater opportunity for knowing whether a Government agent is acting within the scope of his authority than if dealing with a corporation, for the reason that the statutes are open to all. The statutes, Executive or other Orders under which Government agents act, are available to anyone seeking to contract with the Government, so that a person knows, or ought to know when he enters into a transaction with the Government, whether or not the agent is acting within the scope of his authority.

It is suggested in the petition that there should be an authoritative statement by this Court as to

what acts of the Government constitute "commercial transactions" for which the Government is liable as an ordinary citizen.

A "commercial transaction" means the dealing in goods or property for a profit. The very term "commercial transaction" implies a transaction for gain. It does not appear that this Government has been or is now engaged in what might be called purely "commercial transactions." Ordinarily the Government purchases property as it needs it for its own use. After this property has become worn, obsolete or unnecessary for its needs the Government is accustomed to dispose of such property, not with the idea of making a profit, but solely with the thought of disposing of unnecessary material and property—so that every act of the Government in transactions of this character is a governmental act and is in no sense of the word a business deal for gain.

The lack of uniformity of opinion among the judges who reviewed the case at bar in the courts below did not arise because of any confusion on account of the rules of law governing the transaction between the Government, the petitioner and the respondent Johnson. The whole difficulty arose out of the facts, and in no other way.

The facts and circumstances surrounding the transaction involved in the case at bar are unusual, and it is difficult to imagine that a similar condition could again arise. Here is a case where the Government had two boats which it proposed to sell, with names so similar that without due care a mistake was easily possible. Both boats were offered for sale at nearly the same time—the "Wadena" on July 11, 1919, and the "Wandena" on September 8, 1919. The methods of procedure

in disposing of the boats were identical. Both vessels were offered for sale to the highest bidder for cash. The bid of the respondent Johnson was sent to the Navy Department some days before the bid of the petitioner Levinson, but the Johnson bid, through inadvertence or otherwise, was not put in the receptacle used for bids for the "Wadena," and this act led to the awarding of that vessel to Levinson, although he was not the highest bidder.

The principles of law underlying the transaction are clear and well defined, and it does not appear that anything can be gained by a further review of this cause. The Secretary of the Navy acted under the statute of March 3, 1883, as modified or enlarged by Executive Order dated January 7, 1919. There was no doubt in the mind of the Secretary of the Navy as to what his duties were in offering the "Wadena" for sale. He followed precisely the requirements set forth in the statute and executive order in offering it for sale, and every act of the Secretary shows that he understood and followed what the statute prescribed when he offered the vessel at public sale to the highest bidder, for cash.

The Executive Order directed the Secretary of the Navy to advertise and sell at public sale, for cash, to the highest bidder, and also used the language, "at such price as he shall approve." This language, of course has to be read in connection with the other language of the Executive Order, and its clear and unmistakable meaning is that the Secretary exercised his discretion to sell, "at such price as he shall approve" when he prepared his advertisement of the boat for sale to the highest bidder. By so advertising the Secre-

tary of the Navy indicated his intention of approving of the highest offer made for the "Wadena"; and Johnson made that offer.

The decree of the Circuit Court of Appeals directed that the "Wadena" be delivered to the respondent Johnson, and this direction has been complied with.

The prayer of the petitioner for a writ of certiorari should be denied.

Respectfully submitted,

HENRY AMERMAN,

Attorney for Respondent,

S. HARRY JOHNSON.

No. 567

In the Supreme Court of the United States.

October Term, 1939.

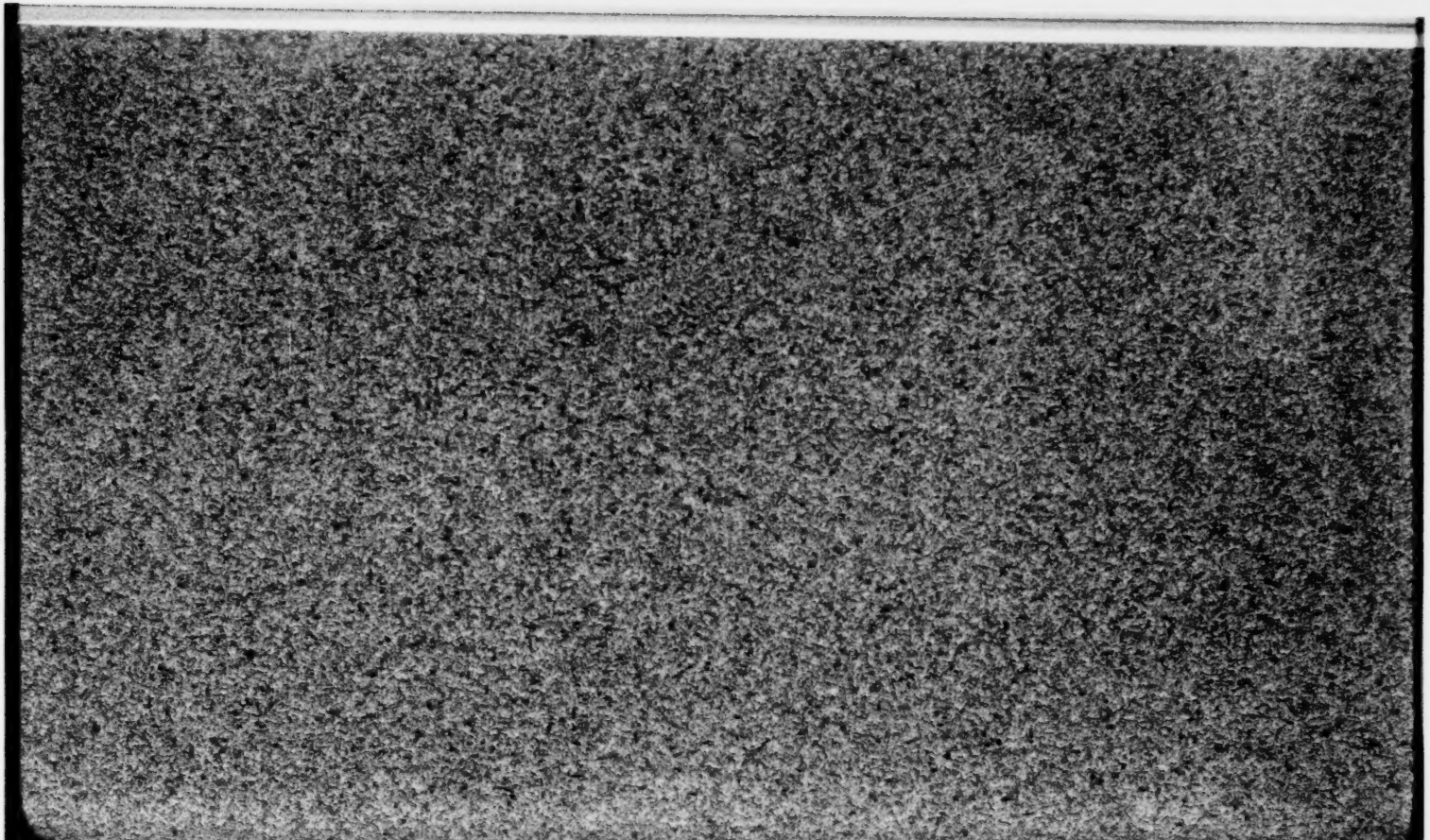
MORRIS LEVINSON, PETITIONER,

v.

UNITED STATES OF AMERICA AND S. HARRY JOHNSON, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUGGESTION OF THE UNITED STATES AS TO DISPOSITION OF PETITION.



In the Supreme Court of the United States.

OCTOBER TERM, 1920.

MORRIS LEVINSON, PETITIONER,
v.
UNITED STATES OF AMERICA AND S. HARRY JOHNSON, RESPONDENTS.
} No. —.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUGGESTION OF THE UNITED STATES AS TO DISPOSITION OF PETITION.

The petition in this case seeks a review of the judgment of the Circuit Court of Appeals. It states, however, that an appeal from the judgment has already been taken and is now pending in this court, and that the application for the writ of certiorari is made only out of an abundance of precaution.

It is respectfully submitted that action on the petition may very properly be deferred until it appears whether the case is properly here by appeal.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

SEPTEMBER, 1920.

11813–20

○

Supreme Court of the United States,

OCTOBER TERM, 1921.

No. 145.

MORRIS LEVINSON,
Defendant-Appellant,

vs.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

S. HARRY JOHNSON,
Defendant-Appellee.

BRIEF ON BEHALF OF DEFENDANT-APPELLEE JOHNSON.

HENRY AMERMAN,
Solicitor for Defendant-Appellee Johnson.

INDEX.

TABLE OF CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 145.

MORRIS LEVINSON,
Defendant-Appellant,

vs.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

S. HARRY JOHNSON,
Defendant-Appellee.

BRIEF ON BEHALF OF DEFENDANT-APPELLEE JOHNSON.

This appeal is from a decree of the United States Circuit Court of Appeals for the Second Circuit (fol. 49).

The facts are fully stated in appellant's brief, except that it is not wholly clear that the vessel involved in this action was delivered to the appellee Johnson shortly after the decree reversing the District Court was filed on June 22nd, 1920 (fol. 49). The Eighth assignment of error, however, alleges that "The Court erred in ordering the yacht 'Wadena' delivered to S. Harry Johnson" (fol. 54), and it can safely be assumed that Johnson obtained the boat about a year and eight months ago.

POINT I.

The Secretary of the Navy, acting under due authority, advertised and offered to sell on July 11th, 1919, the steam yacht "Wadena", for cash to the highest bidder, and he was bound by his written offer of sale.

The terms of the Offer of Sale by the Secretary of the Navy for the Steam Yacht "Wadena" are set forth in paragraphs "III", "IV" and "V" of the Bill of Complaint (fol. 3).

It is obvious from the Offer of Sale that the Secretary of the Navy intended to, and did act under the authority given him by the Act of Congress approved March 3, 1883, as supplemented by Executive Order dated January 7, 1919, and sell the S. S. "Wadena" for cash to the highest bidder. The terms of the offer do not anywhere state or imply that the vessel would be sold "for such price as he [the Secretary of the Navy] shall approve." It is apparent that the Secretary proposed to sell the vessel only to the highest bidder, and this method of sale was adopted by him, as shown by his advertisement. This fact is entirely clear when it is remembered just what the Secretary did. He prepared his offer of sale, and the clear and unmistakable announcement in said offer was: "The vessel will be sold for cash to the highest bidder." Levinson made a bid of $85,150; Johnson submitted one of $86,500. Levinson's bid was opened on August 20th, 1919, and was the

highest bid, except Johnson's for $6,500, which was mislaid. Acting under a misapprehension, the Secretary notified Levinson that his bid was accepted and to forward the balance of his bid, which Levinson thereupon did. The Secretary then sent a bill of sale to Levinson. On September 8th, 1919, Johnson's bid was discovered, and the Secretary forthwith rescinded the order for delivery of the "Wadena" to Levinson and requested him to return the bill of sale. This Levinson declined to do and the Government then brought an interpleader to have the rights of the parties determined. If the Secretary had intended to exercise any discretion allowed him, he would not have stopped the delivery of the vessel to Levinson.

It is therefore clear that the Secretary of the Navy intended to sell to the highest bidder only and not to reject the highest bid. There is no reason for supposing that the Secretary exercised any discretion given him by the Executive Order of January 7th, 1919, and deliberately, knowingly and intentionally rejected the bid of Johnson. Johnson's bid was never rejected. The deposit accompanying Johnson's bid was never returned, but on the contrary Levonson's money was returned to him, with the request that he surrender the bill of sale given to him under a misapprehension and through a mistake of fact.

All these acts of the Secretary, therefore, clearly show that he at no time proposed to sell the "Wadena" to anyone except to the highest bidder, in pursuance of his offer of sale.

The statute approved March 3rd, 1883, gave the President authority to provide by Executive Order

for the sale of boats other than to the highest bidder; but the President did not specifically exercise this authority, but simply directed the Secretary of the Navy to advertise and sell at public sale all vessels not in his opinion necessary for the needs of the Navy, at such price as he approved. The utmost that could be claimed for this is that it conferred upon the Secretary the power to exercise his discretion to sell otherwise than to the highest bidder. The Secretary, however, did not do this, but expressly advertised the "Wadena" to be sold for cash to the highest bidder, following the method prescribed by the statute, and not forbidden by the Executive Order. The only reservations which the Secretary made in the advertisement were the right to withdraw the vessels from sale at any time prior to acceptance of proposals, and to reject any or all bids.

The right, therefore, which persons bidding at this sale, had, was that the ship would be sold to the highest bidder, unless the vessels were withdrawn from sale and any or all bids were called off. The "Wadena" was not withdrawn from the sale; nor were any bids rejected,—certainly not until the Secretary of the Navy rescinded the order for the delivery of the "Wadena" to Levinson, returned the money to him and requested the surrender of the bill of sale given through a mistake of fact.

It is apparent that the Secretary of the Navy could not, and did not intend to approve any bid other than the highest bid when he pursued the method prescribed by the statute in selling the "Wadena", which was offered for cash to the

highest bidder. Had the Secretary intended to exercise his discretion as to the price he would accept for the "Wadena", he would surely have stated that fact in his advertisement of the vessel. It would have been misleading, improper and unjustifiable for the Secretary to have secured bids, upon the announcement that the "Wadena" would be sold for cash to the highest bidder, and then deliberately approve a bid which was not the highest. The Secretary's whole course shows that he had no such thought in mind at any time.

The Secretary having elected to sell to the highest bidder, as indicated by his advertisement and offer of sale, he was bound to so sell the "Wadena", unless the vessel was withdrawn and all bids rejected.

It was a proper reservation for the Secretary of the Navy to make in his offer of sale, that he reserved the right to withdraw any vessel and reject any or all bids. Innumerable conditions might arise that would make it advisable and expedient to withdraw a vessel from sale and call off all bids. This is readily understandable and any bidder could appreciate such a condition. But to say that the Secretary of the Navy did, in the face of his offer, deliberately refuse to approve the highest bid and solemnly and knowingly accept a bid not the highest, is asserting something clearly not in the mind of the Secretary.

POINT II.

The words, "For such price as he shall approve," appearing in the executive order, were never intended, and do not give to the Secretary of the Navy an unlimited discretion and authority to dispose of government property on his mere approbation or sanction, unless he expressly so announced in his offer of sale.

The Act of August 5th, 1882, prescribes when and how vessels of the Navy shall be examined and appraised, and under what conditions sold, and where the proceeds of sale shall go.

The Act of March 3rd, 1883, provides just what the Secretary of the Navy shall do regarding vessels stricken from the Navy Register, and further states that no vessel of the Navy shall thereafter be sold in any other manner than therein provided, unless the President shall otherwise direct in writing.

On January 7th, 1919, the President signed an order, which, to a certain extent, enlarged the powers of the Secretary of the Navy with respect to the manner of disposing of vessels that had been procured for Government use during the war with Germany.

Both statutes provide that vessels shall be sold at public sale, after advertisement, to the highest bidder.

The Executive Order also provides that the

> "Secretary of the Navy shall advertise and sell at public sale any and all said vessels, which are, in his opinion, not necessary for the needs of the Navy."

The uniform method of disposing of vessels belonging to the Government has been to offer same to the public, through advertisements, to the highest bidder, and the plan to sell at public sale was expressly set forth in the Presidents' Order. To say that the words "advertise and sell at public sale" in the Executive Order have no significance and binding force, when we remember the statutory provisions regulating the sale of vessels, is to assert something that is not at all understandable, especially as it would completely vary the practice of selling Government property and repudiate the plan adopted by the Secretary in selling the "Wadena" in this instance.

The words "for such price as he shall approve", must be read in connection with the requirement that the "Secretary of the Navy shall advertise and sell at public sale", and when the Secretary prepared his offer of sale and stated that the vessels would be sold for cash to the highest bidder, he was bound by this proposal and expressly waived whatever authority he had to select from the bids whichever one he saw fit. On any other principle he could have accepted the lowest bid, relying upon the language of the Executive Order to justify his act. But it is clear, from all the facts, that the Secretary reserved no such right unto himself. The acceptance of Levinson's bid

was certainly not on any theory of the right given to the Secretary to sell the "Wadena" at such price as he approved below the highest bid.

The learned Trial Court, in its opinion states that the Secretary of the Navy would probably not be justified in accepting a markedly low bid and that he must act openly and fairly, so as not to be subject to criticism. This argument, however, does not sustain the theory that the Secretary could sell at such price as he approved. If the words are to be taken literally and given their ordinary meaning, without reference to the facts and circumstances involved in the whole transaction, the argument of the learned Trial Court would definitely and clearly lead to the conclusion that the Secretary of the Navy had absolutely unlimited authority to approve any price that he saw fit, even a bid for a few dollars. This was clearly not the purpose and meaning of the Executive Order and no such discretion was attempted to be exercised by the Secretary.

If it be assumed that the Secretary was authorized by the Executive Order to sell the "Wadena" at public sale for such price as he should approve, by choosing to advertise that the vessel would be sold to the highest bidder, he thereby exercised the discretion reposed in him by said Executive Order to accept and approve of the price to be offered by the highest bidder and waived his right to approve any other bid.

POINT III.

Under the facts appearing in the record, the Secretary of the Navy was obliged to sell the "Wadena" to Johnson.

Johnson made his bid in strict compliance with the Secretary's offer of sale. Levinson also observed the requirements set forth in the advertisement. There might have been other bidders for ought we know. The record is silent on this point. Johnson bid $6,500. Levinson's bid was $5,150.

The bidders must have assumed that the boat was to go to the one offering the largest amount. It is inconceivable that the Secretary of the Navy or any bidder believed that the Secretary had any thought of selecting from the bids, and approving one not the highest.

Appellant asserts that his bid was in law and in fact the highest one received. This statement is no doubt made on the theory: *First*, that his was the highest opened on August 20th, 1919, and because of this physical act, no other element can enter into the transaction. *Second*, that when the Secretary of the Navy notified Levinson that his bid was accepted and the full amount of the bid paid and a bill of sale executed and delivered, the contract was completed.

The duties of the Secretary are ministerial. He acts under statutes or orders having the binding force of law. He offered to sell the Wadena for cash to the highest bidder, and an error on the part of some one in his department could not enlarge his powers or defeat his legal obligation.

On this point, the Circuit Court of Appeals said:

> "The relation of the Government to its agents is different from that of private parties. To bind the Government its agent must act strictly within his official authority and every one who deals with him takes the risk of his doing so. The subject has not been frequently considered but is treated of in *United States* v. *Stock Growers Association*, 30 Fed. Rep. 912; *The Floyd Acceptances*, 7 Wall. 666; *Cooke* v. *United States*, 91 U. S. 389; *Steele* v. *United States*, 113 U. S. 128."

Appellant suggests the possibility of another bid for the Wadena appearing five or ten years hence, that is a few dollars higher than either Levinson's or Johnson's, and inquires if it would seriously be contended that this bidder could then make any claim to the vessel! The obvious answer to this query is that any one who waited for such a long period before asserting any claim would be guilty of such laches that he would not be heard in any court.

(a) *It was the duty of the Secretary of the Navy to refuse to deliver the Boat to Levinson.*

Appellant has given much consideration in his brief to the question of rescission of the bill of sale to Levinson, and argues and cites authorities in an effort to show that the Government had no power to rescind.

It must be assumed that the Secretary of the Navy, when he offered the Wadena for sale, knew the extent of his authority and intended to and did act within the provisions of law applicable

thereto. It does not appear in the bill of complaint, nor anywhere in the record, that the Secretary, in his notice of sale, asserted that he would sell the Wadena "at such price as he would approve," but would sell for cash to the highest bidder. Levinson was not misled by the offer of sale. He understood the precise conditions, but now insists that the Secretary of the Navy asserted the authority which he (Levinson) believes he has under the Executive Order, and is trying to maintain that the Secretary actually approved of his bid.

Appellant overlooks completely the fact that the Secretary is a creature of the law, and his acts must conform thereto. The question of rescission is not important if the giving of the bill of sale to Levinson was unauthorized, as the Court below held.

POINT IV.

A mistake was made, and whether it was mutual or otherwise, equity will relieve.

The acceptance of Levinson's bid was predicated on the belief that it was the highest bid. The action of the Secretary was taken under a complete misapprehension of fact on his part, and on the part of Levinson, namely, that there was a higher bid. Both parties were unaware of Johnson's bid. The Secretary was certainly ignorant of the fact, and Levinson was equally uninformed.

If Levinson knew of the precise facts when his bid was accepted as being the highest bid, he would have acquiesced in and carried out the transaction knowing that the Secretary was laboring under a mistake of fact. The receipt at the office of the Secretary of the Navy of a letter from Johnson on or about the 12th day of August, 1919, containing a sealed bid for the "Wadena," which was not to be opened until the time fixed in the offer of sale, and which letter was inadvertently mislaid, does not prove that no mistake was made, but the mere statement establishes the exact opposite.

The situation might have been different if the communication could have been and was opened and the contents thereof ascertained. A principal might be charged with knowledge of an unauthorized act of his agent under some conditions. Under the facts appearing in this case, however, it cannot be claimed that the Secretary had even constructive knowledge of Johnson's bid, and therefore must be presumed to know the facts. The Secretary offered to sell the "Wadena" to the highest bidder. Levinson knew this and made his bid with full knowledge of the fact. Johnson also understood the conditions of sale, as did every other bidder. The mislaying of one of the bids could not alter the terms of sale, but might lead to confusion, as it has done in the case at bar.

The Secretary of the Navy waived no rights and disregarded no duty by accepting, through a mistake, Levinson's bid; nor was he estopped from refusing to complete the transaction by delivery

of the vessel to Levinson, when the facts were ascertained. Levinson had not in any way changed his position after receiving the bill of sale and notice that the "Wadena" would not be delivered to him. This fact is established by Levinson's answer admitting the allegations of the bill of complaint.

In the case of *United States* v. *Walsh*, 115 Fed. Rep. 697, at p. 702, the Court stated:

> "The acceptance of the drydock, after the final test, did not conclude the Government if it was made in ignorance of facts, which, if known, would have led to his refusal to accept."

It is urged that Levinson obtained title to the "Wadena" and that he could not thereafter be divested of same, even though the bill of sale was given to him through mistake. This argument is not in accord with the principle laid down in the case of *Williams* v. *United States*, 138 U. S. 514, at p. 517. The Court there said:

> "The allegations of the bill are of fraud and wrong, but they also show inadvertence and mistake in the certificate of the State, and it cannot be doubted that the inadvertence and mistake are, equally with fraud and wrong, grounds for judicial interference to divest a title acquired thereby."

In the case of *Moffett, Hodgkin & Clark Co.* v. *Rochester*, 178 U. S. 373, the evidence in that case showed that the Moffett Company had made a mistake in filing a bid for certain construction work to be done in the City of Rochester. The

bids were opened on a certain date and when same were publicly read to the different bidders the engineers of the Moffett Company discovered that they had made a mistake in their figures, and they then and there requested the Commissioners to permit the Moffett Company to revise its figures or to withdraw the bid. The Commissioners refused both requests of the Moffett Company, stating they had no power to either permit a withdrawal of the bid or allow an amendment of the figures, and the bid was awarded to the Moffett Company. This case was finally decided upon the question of the right of a bidder to rescind a contract after the bid had been accepted. But the question of the power of a court of equity to act where a mistake has been made, and no laches shown, is discussed and has a distinct application to the question involved in this case.

(a) *It is admitted by both defendants that a mistake was made.*

The Bill of Complaint alleges, and the answers of both defendants admit the allegation that a mistake was made. The Bill of Complaint (par. VII) alleges:

> "Through inadvertence and mistake and by reason of the similarity of the names 'Wadena' and 'Wandena', said bid of the defendant, S. Harry Johnson was placed with the bids for the vessel 'Wandena' and not with those of the vessel 'Wadena' (fol. 6).

The answers of both defendants admit the allegations of the Bill (fols. 11 and 13).

The defendant-appellant cannot, therefore, maintain, as he has done in his brief, page 24, that a mistake has not been made.

It accordingly must be taken as one of the facts in this case that a mistake was made.

In the case of *Van Dyke v. Maguire*, 57 N. Y. 429, at page 431, the Court says:

> "That what the parties have agreed to in their pleadings shall be admitted, though the jury find otherwise."

It is therefore an established fact that a mistake was made, and no laches having been shown in an endeavor to correct the mistake, equity will render appropriate relief.

POINT V.

The act of the Secretary of the Navy in refusing to deliver the "Wadena" to the defendant-appellant was necessary in the interest of public policy.

In the opinion of the Court below, the Court says:

> "The Secretary agreed to sell the 'Wadena' to the highest bidder and this he supposed he was doing when he accepted Levinson's bid. He exercised and intended to exercise no discretion to accept anything but the highest bid. He had no authority to do so under the notice of sale. Therefore in delivering the bill of sale to Levinson he acted without authority to bind the Government. It is necessary as a matter of public policy that the Government be protected in this way against liabilities unlimited in number and amount resulting from the mistakes or misconduct of its agents."

In *McKnight* vs. *United States*, 98 U. S. 179, at page 186, the opinion recites:

> "With a few exceptions *growing out of the consideration of public policy*, the rules of law which apply to the Government and to individuals are the same."

The present case is one of these exceptions, for unless this power can be exercised by a court of equity in cases like the one at bar, the Government would not be protected against liabilities unlimited in number and amount resulting from the mistakes of its agents.

Therefore, as a matter of public policy, it was obligatory for the Secretary of the Navy to refuse to deliver the "Wadena" to the defendant appellant, and for the United States to bring an action to determine which of the defendants was entitled to the possession of the boat.

FINAL POINT.

For all of the foregoing reasons the decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

HENRY AMERMAN,
Solicitor for Defendant-Appellant,
S. Harry Johnson.

END

OF

CASE

LEVINSON *v.* UNITED STATES ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 145. Argued March 3, 1922.—Decided March 13, 1922.

1. A suit in the nature of interpleader by the United States against one to whom it had given a bill of sale of a vessel and another whose bid had been overlooked, to determine their rights, *held* cognizable in equity (all parties consenting) although the plaintiff did not stand indifferent but sought to maintain the higher bidder's claim and thus get the higher price. P. 200.
2. Under the Act of March 3, 1883, c. 141, § 5, 22 Stat. 599, governing sales of vessels not needed for the Navy, the President is empowered to direct a departure from the prescribed manner of sale, and his direction to the Secretary of the Navy to sell "for such price as he shall approve," empowered the latter to sell to the lower of two bidders, notwithstanding the advertisement was that the sale would be to the highest bidder. P. 201.
3. The Secretary, overlooking a higher bid by mistake, approved a lower one as the highest and issued a bill of sale of the vessel accordingly. *Held*, that his action was conclusive in favor of the lower bidder and that the mistake, not attributable to the latter, gave the competitor no equitable claim to the title. P. 201.
4. An appeal here from a decision of the Circuit Court of Appeals adjudging property to one of two interpleaded defendants, *held* not affected by entry of decree, under that court's mandate, in the District Court, and the act of the plaintiff in delivering the property under it. P. 202.

267 Fed. 692, reversed.

APPEAL from a decree of the Circuit Court of Appeals which reversed a decree of the District Court in favor of Levinson and adverse to Johnson in a suit in the nature of an interpleader brought against them by the United States to determine their respective rights in a vessel.

Mr. John A. McManus for appellant.

Mr. Henry Amerman for Johnson, appellee.

The Secretary of the Navy, acting under due authority, advertised and offered to sell on July 11, 1919, the steam

yacht "Wadena", for cash to the highest bidder, and he was bound by his written offer of sale.

The words "for such price as he shall approve," appearing in the executive order, did not give to the Secretary an unlimited discretion to dispose of government property on his mere approbation or sanction, unless he expressly so announced in his offer of sale.

Under the facts appearing in the record, the Secretary was obliged to sell the "Wadena" to Johnson.

A mistake was made, and whether it was mutual or otherwise, equity will relieve. The acceptance of Levinson's bid was based on the belief that it was the highest. The action of the Secretary was taken under a complete misapprehension of fact on his part, and on the part of Levinson, that there was no higher bid. Both parties were unaware of Johnson's bid. *United States* v. *Walsh*, 115 Fed. 697, 702; *Williams* v. *United States*, 138 U. S. 514, 517; *Moffett, Hodgkins & Clarke Co.* v. *Rochester*, 178 U. S. 373.

The Secretary's refusal to deliver the "Wadena" to Levinson was necessary in the interest of public policy. *McKnight* v. *United States*, 98 U. S. 179, 186.

Mr. Solicitor General Beck and *Mr. Blackburn Esterline*, Special Assistant to the Attorney General, by leave of court, filed a brief on behalf of the United States, as *amici curiae*.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a controversy between the appellant, Levinson, and Johnson, one of the appellees, as to which of the two is entitled to the steam yacht Wadena. The yacht had been taken for the purposes of the late war and subsequently was offered for public sale by the Secretary of the Navy in pursuance of an Executive Order of January 7,

1919, authorized by the Act of March 3, 1883, c. 141, § 5, 22 Stat. 599. Levinson sent in a bid complying with the terms of the offer, was declared the highest bidder and sent his check for the residue above the required deposit. Thereupon he received a bill of sale under the seal of the Department dated September 3, 1919, acknowledging that he had become the legal purchaser and had paid the price, and stating that the vessel "is hereby delivered to and declared to be the property of said Morris Levinson." On September 8 it was discovered that Johnson had sent in a higher bid which had been misplaced and overlooked. After making the discovery the Navy Department refused to give up the Wadena to Levinson and attempted to rescind the transaction with him. He insisted on his rights and Johnson on his side offered to pay the amount of his bid and also demanded delivery of the yacht. The United States thereupon brought the present bill to determine the rights of the parties, and although it did not stand indifferent and has endeavored to maintain Johnson's right and so to get the higher price, not to speak of Levinson's claim in contract, still as all parties consented to the jurisdiction we do not feel called upon to raise a question upon that score. See *McGowan* v. *Parish*, 237 U. S. 285, 295, *et seq.*

The District Court decided in favor of Levinson. Both Johnson and the United States appealed. The Circuit Court of Appeals dismissed the appeal of the United States on the ground that it was a mere stakeholder, but, one Judge dissenting, reversed the decree of the District Court and decided in favor of Johnson, on the ground that the Secretary of the Navy had no authority to accept any other than what was the highest bid in fact. 267 Fed. 692.

We are of opinion that the Circuit Court of Appeals construed the authority of the Secretary of the Navy too narrowly and that the decision of the District Court was right. The Act of 1883, § 5, provides for an appraisal

and an advertisement for three months setting forth the appraised value and that the vessel will be sold to the offerer of the highest price above the appraised value, &c. The section concludes " But no vessel of the Navy shall hereafter be sold in any other manner than herein provided, or for less than such appraised value, unless the President of the United States shall otherwise direct in writing." The power of the President to direct a departure from the statute is not confined to a sale for less than the appraised value but extends to the manner of the sale. The word " unless " qualifies both the requirements of the concluding clause. The executive order seemingly so construes the statute, for it merely provides that if the former owner of the vessel will not purchase at the appraised value the Secretary of the Navy shall sell at public sale " for such price as he shall approve." The Secretary construed the order to like effect. He did not advertise for three months and he allowed a variation from the statute in the form of deposit required.

It seems to us that the practices of ordinary business dealing ought so far to bind the United States that the ostensible authority given by the executive order, the Secretary's declaration that Levinson's bid was the highest, his approval of the price, and his execution of a bill of sale, should be held conclusive in favor of Levinson. The fact that the Secretary advertised that he would sell to the highest bidder could not limit his authority or diminish the effect of his acts. Even if Johnson's bid had made a contract automatically by being the highest, it would not follow that Levinson's title was bad. But a bid had no such effect, as the right to reject it was reserved. We can see no justification beyond the wish to secure a higher price, for the refusal to allow the appellant to remove his yacht. The title passed to him upon the execution of the bill of sale. *Hatch* v. *Oil Co.*, 100 U. S. 124, 128.

It is suggested that there is no longer a question before the Court because it is said that the District Court entered a decree in pursuance of the decision of the Circuit Court of Appeals and that the Navy Department thereupon delivered the yacht to Johnson. This was a further departure from the position of stakeholder assumed by the United States but cannot affect the decree to be entered upon its bill. It is urged for Johnson that there was a mistake that relieved the Government. There was no mistake that Levinson had anything to do with or that would warrant a court of equity in requiring him to give up the title that he acquired.

Decree of Circuit Court of Appeals reversed.

MR. JUSTICE CLARKE was absent and took no part in the decision.

MR. JUSTICE McKENNA, dissenting.

The opinion, in my view, gives too much prominence to the action of the Navy Department and, in effect, determines the case by it as if the controversy were between the Department and Levinson, and not between him and Johnson. It caused the controversy, indeed, and by its mistake gave a right to Levinson to which Johnson was entitled. Has the law no redress for the injury thus inflicted? It would be a reproach to it if it have not.

Let me repeat the facts. In pursuance of a statute, and in the manner directed by it, the Navy Department offered the yacht Wadena for sale. It was the duty of the Department to the Government of which it was an instrument to accept the highest bid, and it owed a duty as well to him who should be the highest bidder. Johnson responded to the offer of sale and his bid was the highest. By mistake, however, the bid was assigned to a boat of similar name. In consequence of the mistake Levinson was considered the highest bidder and a bill of sale was issued to him. Before the delivery of the yacht, however,

the mistake was discovered and the yacht was retained by the Department. This being the situation, the Department, not in its own interest, not in partiality to either claimant, caused this suit to be brought that the rights of the claimants could be adjudicated. The suit is a disclaimer of interest or favor; it is in the nature of a bill of interpleader and the contest is remitted to the interpleaded, Levinson and Johnson, and the law of their rights. And that law is dependent upon what they did, not upon what the Navy Department did,—upon the priorities between them, not upon a chance advantage. These are the elements that should determine judgment, whether we assign to accident or mistake the action of the Department in declaring Levinson to be the purchaser of the yacht. I need not dwell upon the sufficiency of either as a ground of relief.

Accident is said to be one of the oldest heads of equity jurisdiction, and a learned authority says its first and principal requisite is, that, by an event not expected nor foreseen, one party has without fault and undesignedly undergone some legal loss while another party has acquired a legal right which it is contrary to good conscience for him to retain and enforce. 2 Pomeroy, § 824.

The requisites and consequences are in this case, and exhibit the relative situations and rights of Levinson and Johnson. Levinson has acquired a right to which Johnson was entitled and which Johnson lost by an accident to which he was not a contributor. The law in its sufficiency and prudence meets such contingent happening and gives a remedy to prevent or redress its injury. That Levinson was given a bill of sale is not a serious deterrent. As the bill of sale could have been refused it can be disregarded as an element of decision.

Mistake as well as accident (mistake may be considered a corollary of accident) is a ground of relief which the law's remedial consideration furnishes for the redress of

injustice. And that a mistake was made cannot be denied, and to which no act or negligence of Johnson was accessory. He responded to the solicitation of the Navy Department executing the law, and he was entitled to the preference that the law commanded. It was given to another by mistake. The law will not permit him to retain it, and this is a necessary deduction, I confidently believe and, therefore, confidently express, though it is opposed by the judgment of my brethren. I repeat, that there was a mistake cannot be disputed, and I cannot think that its consummation protects it from correction and that a remedy should be denied because it is needed, all of its conditions existing.

It was the view of the Circuit Court of Appeals in a well reasoned opinion that the Secretary of the Navy had "no authority to deliver the bill of sale to Levinson" but was "bound to deliver it to Johnson." There is much to sustain the decision; I, however, base my dissent upon the views that I have expressed, and think that the judgment of the Circuit Court of Appeals should be affirmed.